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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 168.

THEODORE J. McGOWAN AND ROBERT C. BLISS, PARTNERS UNDER THE FIRM NAME OF THE McGOWAN PUMP COMPANY, PLAINTIFFS IN ERROR,

vs.

THE AMERICAN PRESSED TAN BARK COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 13, 1883.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and western division of the southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati on the first Tuesday of April, being the third day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and in the one hundred and seventh year of the Independence of the United States of America—present, the Honorable E. S. Hammond, judge of the district court for the western district of Tennessee, holding by appointment the circuit court of the United States for the southern district of Ohio—among the proceedings had were the following, to wit:

THE AMERICAN PRESSED TAN BARK COMPANY, a Corporation under the Laws of the State of New Jersey,
vs.
THEODORE J. MCGOWAN AND ROBERT C. BLISS, Partners under the Firm Name of the McGowan Pump Company. } 3260.

Money.

Be it remembered that heretofore, to wit, on the 6th day of July, A. D. 1882, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid a certain petition in this case, which said petition is in the words and figures following, to wit:

2 *Petition.*

United States Circuit Court, Southern District of Ohio, Western Division.

THE AMERICAN PRESSED TAN BARK COMPANY, a Corporation Created under the Laws of the State of New Jersey, Plaintiff,
vs.
THEODORE J. MCGOWAN AND ROBERT C. BLISS, Partners under the Firm Name of "The McGowan Pump Company," Defendant. } 3260.

Money.

Plaintiff says it is a corporation created under the laws of the the State of New Jersey, and is a citizen of the said State of New Jersey.

The defendants, Theodore J. McGowan and Robert C. Bliss, are each of them citizens of the State of Ohio, and they are residents of the southern district of Ohio and western division thereof.

Plaintiff avers it is the owner of valuable patents of the United States for the manufacture and sale of pressed tan bark. As such owner and for the purpose of developing and carrying on the business of pressed tan bark thereunder it entered into a contract with one James Mack, of the city of Cincinnati, Ohio, for the construction of a steamboat. Said boat was to be constructed for the purpose of receiving, carrying, and operating the machinery hereinafter

named, and was to be constructed, by agreement with de-
3 fendants, under their control and supervision and to their acceptance. Said machinery was to be constructed and erected on said boat by defendants for the plaintiffs in the manner, for the purpose, and according to the terms of the contract hereinafter set forth. Said boat was constructed by said Mack for plaintiff and was constructed under the supervision and control of defendants, and was accepted by defendants.

The contract for the construction of said boat for said purpose was made with said Mack with the full knowledge on the part of defendants of the purpose for which it was being constructed, and with the direction, counsel, and advice of defendants.

Said boat and necessary equipments has cost plaintiff, including insurance and expenses thereon to date, a sum in excess of fourteen thousand dollars ($14,000.00.)

Plaintiff further avers that on the 23rd day of June, 1881, the defendants entered into a contract with plaintiff, in consideration of the payment to be made by plaintiff to defendants on the completion of said contract of the sum of twenty-three thousand seven hundred dollars ($23.700.00), whereby defendants agreed and guaranteed to construct, erect, complete, and have in operation on board of said boat, within sixty days from the said 23d day of June, 1881,
for the purpose of pressing tan bark under said patent pro-
4 cess and according to plans, specifications, and details furnished by defendants, the following machinery:

One 14″x24″ engine and all necessary trimmings for grinding bark.

Two 14″x48 engines and all necessary trimming for propelling boat.

Three boilers 42″x26″, with all necessary trimmings.

Three bark mills, with all necessary trimmings and gearings.

One bark elevator; two elevators with platforms for raising and lowering pressed bark to and from the hold of the boat, to be provided with safety catches and unwinding service; three heaters, one for bark engine, one for boat engines, and one for steam pumps; one steam pumps for boiler feed; one deck hand-pump; two hundred and fifty feet of hose; two-inch rubber hose, couplings, and three nozzles; two hoppers and scales to weigh bark; all the necessary shafting hangers, pulleys, belting, and all steam and escape pipes.

Also one twenty-inch hydraulic press and two twelve-inch hydraulic presses, with their necessary fixtures and connections, together with the necessary hydraulic steam pumps, tank, &c., for
pressing bark into bales. All of the aforesaid machinery
5 defendants guaranteed to be done in a workmanlike manner, and of first-class material, and set up aboard the said boat at said city of Cincinnati, and by the terms of said contract said defendants guaranteed all of said machinery to have a sufficient capacity to do and would do the required work, and would pass Government inspections; and, further, defendants guaranteed, as a part of said contract, that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, and that the time

necessary for pressing and delivering each bale of bark would be two and one-half minutes.

Plaintiff avers that said defendants have wholly failed to construct, erect, and complete said machinery according to said contract, and defendants have wholly failed to erect and complete said machinery within the time set forth in said contract, and have not constructed, erected, completed, and furnished to plaintiff the said machinery to this date; and said defendants have wholly failed and refused to perform said contract.

Plaintiff further avers that defendants between the date of said contract, to wit, the 23rd day of June, 1881, and the 1st day of April, 1882, constructed and erected on board of said boat certain machinery which defendants claim to have constructed and
6 erected as required by said contract, but which said machinery is not of the quality, material, and workmanship set forth in said contract; is constructed of insufficient and inferior material, and is very inferior and defective in quality and character of workmanship, and is wholly useless and insufficient for the purpose set forth in said contract, and is wholly unfit and insufficient, and wholly fails to do the work required of it according to said contract, and for which it was constructed and erected. The hydraulic machinery covered by and embraced in said contract is constructed of insufficient and inferior material, and is wholly unfit and insufficient in capacity and of defective and inferior workmanship, and is wholly useless to perform the purpose set forth in said contract, and for which it was constructed and erected. Said hydraulic machinery wholly fails to comply with the terms of said contract and said guaranty, and will not give, sustain, nor work up to the fifteen-hundred-tons pressure as guaranteed by defendants, and is inferior and defective in quality and character of workmanship and unsafe.

Plaintiff further says it has wholly performed the parts of said contract on its part to be performed, and has complied with all the terms thereof, and has paid to defendants on account of said
7 sum of twenty-three thousand seven hundred dollars in advance of the time when the same was to become due the following sums at the following dates:

November 5th, 1881	$4,500 00
November 26th, 1881	2,500 00
January 24th, 1882	3,000 00
February 28th, 1882	2,500 00
March 30th, 1882	4,000 00

Making the total amounts paid to defendants sixteen thousand five hundred ($16,500.00) dollars.

Plaintiff further avers that the said machinery was according to said contract, as aforesaid, to be constructed, erected, and completed on board of said boat within sixty days from June 23rd, 1881, by defendants, in order to enable plaintiff to operate said boat and machinery on the Tennessee river during the fall season of 1881 in the pressing of tan bark; and defendants agreed to have it so con-

structed, erected, and completed, to enable plaintiff so to operate said boat, and with a full knowledge on the part of defendants, before the making of said contract, of the said purpose and desire of plaintiff; that in pursuance of said purpose to operate said boat and machinery on the Tennessee river, as aforesaid, plaintiff purchased and held ready to be pressed by said machinery a large quantity—to wit,
8 about (2,500) twenty-five hundred tons—of tan bark, for which plaintiff paid the sum of fourteen thousand ($14,000) dollars, at various points on the Tennesse river, to be used and pressed by plaintiff immediately on the completion of said machinery according to said contract; and which said bark, until the same should be compressed by said machinery, was unfit and unsuitable for shipment from the points where it was so held by plaintiff; and which said bark to the amount and value as aforesaid has become a total loss to plaintiff by exposure and deterioration thereby.

Said loss of said bark was wholly caused by the failure of defendants to comply with their contract, and to construct, erect, and complete the said machinery according to said contract; and the purchase and holding by plaintiff of said bark for the purpose of being compressed as aforesaid was well known by defendants at the time said contract for the construction, erection, and completion of said machinery was made, and said bark was purchased and held by plaintiff for said purpose, as defendants well knew at the time said contract was made, on the faith of the performance by defendants of said contract in the manner and at the time as therein provided as aforesaid.

Plaintiff further avers that by reason of the failure and refusal of
9 defendants to comply with their contract as aforesaid, and by reason of the — thereof by defendants as aforesaid, it has incurred large expenses in the employment of agents and in the purchase of material and other expenses; that it had been wholly unable to use said boat, and that said boat and said machinery are wholly useless and of little value, and plaintiff has hitherto been unable to use the same.

Plaintiff says it has suffered damages as aforesaid by reason of defendants' failure to perform said contract, and by reason of defendants' breach of said contract, as aforesaid, in the sum of sixty thousand ($60,000.00) dollars, with interest from July 1st, 1882.

Wherefore plaintiff prays judgment against defendants for the said sum of sixty thousand ($60,000.00) dollars, with interest from July 1st, 1882, their damages as aforesaid and their costs herein expended.

THOS. McDOUGALL &
STALLO, KITTREDGE & SHOEMAKER,
Attorneys for Plaintiff.

STATE OF OHIO, }
Hamilton County, } *ss:*

Samuel H. Beach, being duly sworn, says he is the duly authorized agent of the said plaintiff; that said plaintiff is a non-resident of the State of Ohio; that the facts stated and allegations made in

the foregoing petition are true, as he verily believes, — are within his personal knowledge.

SAMUEL H. BEACH.

10 Sworn to before me and signed in my presence this 6th day of July, 1882.

[SEAL.] WILLIS M. KEMPER,
Notary Public, Hamilton County, Ohio.

Endorsed as follows, to wit:

Precipe. The clerk will please issue summons on the petition in above cause in an action at law. Amount claimed, $60,000.00, with interest from July 1st, 1882. Thos. McDougall and Stallo, Kittredge & Shoemaker, att'ys for plaintiff.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons in this cause, directed to the marshal of said district, and against the said defendants, which said writ of summons is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon Theodore J. McGowan and Robert C. Bliss partners, under the firm name of "The
11 McGowan Pump Company," citizens of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the third Tuesday in the month of July, 1882, to answer unto The American Pressed Tan Bark Company, a corporation created under the laws of the State of New Jersey, and citizen of and resident in the State of New Jersey, in civil action for money.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this sixth day of July, A. D. 1882, and in the 107th year of the Independence of the United States of America.

Attest: [SEAL.] WM. C. HOWARD, *Clerk.*

Endorsed as follows, to wit:

Endorsement: Action for money only. Amount claimed, $60,000.00, with interest from July 1st, 1882, for which judgment may be taken unless they answer herein on or before the first Tuesday of August, A. D. 1882.

And afterwards, to wit, on the 10th day of July, A. D. 1882, came the marshal of said district, to whom the said writ of summons was in form aforesaid directed, and returned the same into the
12 clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

Marshal's Return on Summons.

Rec'd this writ at Cincinnati, O., July 6th, 1882, and served the same in Hamilton county, as follows: On the within-named Theodore J. McGowan and Robert C. Bliss, partners under the firm name of the McGowan Pump Company, by delivering a true copy hereof to each of them personally July 8th, 1882, at 8.35 a. m.

J. C. ULLERY, *U. S. M.*,
By C. E. TWIFORD, *Dep.*

13 And afterwards, to wit, on the 11th day of October, A. D. 1882, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Default Set Aside, &c. J'rn'l Entry, V. 461.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

On motion to the court, it is ordered that the default herein be, and the same is hereby, set aside, and leave is given the defendants to file their answer herein forthwith, and the same is accordingly filed.

Which said answer is in the words and figures following, to wit:

Answer.

United States Circuit Court, Southern District of Ohio, Western Division.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

The answer of Theodore J. McGowan and Robert C. Bliss, made defendants to the petition in the above-entitled cause.

Now come the defendants and, by way of answer as aforesaid, say that they admit that the plaintiff is a corporation created as
14 stated in the petition, and is a citizen of the State of New Jersey; that they, the said Theodore J. McGowan and Robert C. Bliss, are, and each of them is, a citizen of the State of Ohio and a resident of the southern district of Ohio and the western division thereof; that they have no knowledge or information sufficient to enable them to form a belief whether the plaintiff is the owner of valuable patents for the manufacture and sale of pressed tan bark, or whether it entered into a contract with James Mack, as alleged in the petition. They therefore deny each and every averment of the petition in this regard.

They further say that they have no knowledge or information sufficient to form a belief as to the truth of the averment in the petition with regard to the cost of the steamboat therein described, and therefore deny that the said steamboat and necessary equipments have cost the plaintiff, including insurance and expenses, a sum in excess of fourteen thousand dollars, as averred in the petition. Each and every other averment of the petition they deny.

Wherefore they pray to be hence dismissed with their costs..

HOADLY, JOHNSON & COLSTON,
LINCOLN, STEPHENS & SLATTERY,
Att'ys for Defendants.

UNITED STATES OF AMERICA, }
Southern District of Ohio, } *ss:*

15 Theodore J. McGowan, being duly sworn, says that he is one of the defendants above named, and that he believes the statements of the foregoing answer to be true.

THEODORE J. McGOWAN.

Sworn to before me and subscribed in my presence this 10th day of October, 1882.

[SEAL.]

JNO. F. JOCKEL,
Notary Public, Hamilton Co., O.

And afterwards, to wit, on the 19th day of January, A. D. 1883, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 579.

THE AMERICAN PRESSED TAN BARK CO. }
vs. } 3260.
THEODORE J. McGOWAN *et al.* }

Money.

By consent of all parties it is ordered that this cause be set down for trial on the first Monday in the month of March, A. D. 1883.

And afterwards, to wit, on the 5th day of March, A. D. 1883, a further entry was made upon the journal of said court in said cause, which entry is in the words and figures following, to wit:

16 *J'rn'l Entry, V.* 29.

THE AMERICAN PRESSED TAN BARK CO. }
vs. } 3260.
THEODORE J. McGOWAN *et al.* }

Money.

It is ordered that this cause be, and the same is hereby, continued to Monday, the 26th day of this month.

And afterwards, to wit, on the 26th day of March, A. D. 1883, an

entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 54.

THE AMERICAN PRESSED TAN BANK CO. vs. THEODORE J. McGOWAN *et al.* } 3260.

Money.

Upon application of the defendants it is ordered that this cause be, and is hereby, continued to Tuesday, the third day of April next, and it is further ordered that the defendants pay the costs of this term, to be taxed, and it is further ordered that a rule to show cause issue against all the witnesses who failed and refused to obey the command of a subpœna issued for them in this court.

And afterwards, to wit, on the third day of April, A. D. 1883, a further entry was made upon the journal of said court in said
17 cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 65. *Jury Sworn, &c.*

THE AMERICAN PRESSED TAN BARK CO. vs. THEODORE J. McGOWAN *et al.* } 3260.

Money.

This day came the parties, by their attorneys, and thereupon, to try the issues, a jury being called, came, to wit, Thomas Betts, John B. Blake, J. D. Campbell, Frank De Silver, J. L. Hackney, Jacob Haynes, Alex. McConnell, John E. Naylor, John Philips, Jacob Stout, George Westfall, and John L. West, who were duly empaneled, sworn, and affirmed well and truly to try the issues joined between the parties, but, being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the fourth day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 66.

THE AMERICAN PRESSED TAN BARK CO. vs. THEODORE J. McGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also
18 the jurors heretofore empaneled and sworn herein, but the testimony not being concluded the court respited the jury

until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 5th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry. V. 67.

THE AMERICAN PRESSED TAN BARK CO. *vs.* THEODORE J. McGOWAN *et al.* } 3260.

Money.

Upon application to the court leave is granted the defendants to file an amendment to its answer herein forthwith, and the same is filed; and thereupon this cause came — for hearing upon the demurrer of plaintiff to each and every defense set forth in the amended answer filed by leave herein, and the court, being fully advised in the premises, overrules said demurrer to each and every of said defenses; to which ruling of the court said plaintiff, by its counsel, did then and there except; and thereupon said plaintiff, by its counsel, prayed leave to reply instanter to say answer, which leave the court granted, and their reply was thereupon filed accordingly.

19 And afterwards, to wit, on the 5th day of April, A. D. 1883, came the defendants, by their attorneys, and, by leave of court first had and obtained, filed in the clerk's office of the court aforesaid a certain amendment to the answer in this cause, which said amendment to the answer is in the words and figures following, to wit:

Amendment to Answer.

Circuit Court of the United States, Southern District of Ohio.

THE AMERICAN PRESSED TAN BARK COMPANY, Plaintiff, *vs.* THEODORE J. McGOWAN and ROBERT C. BLISS, Partners as The McGowan Pump Company, Defendants. } 3260.

Money.

Now come the defendants, Theodore J. McGowan and Robert C. Bliss, sued as partners under the name of The McGowan Pump Company, and, by way of further defense, without withdrawing their original answer heretofore filed, now, by leave of the court, answer as follows:

2. Second defense. These defendants, protesting that the contract dated June 23rd, 1881, described in the petition, was not made with them, but with the McGowan Pump Company, a corporation

20 of Ohio, say that if it shall appear upon the trial of this cause that the contract was made with them as partners under the name of the McGowan Pump Company, and not with said cor-

poration, then they say that said contract as made June 23, 1881, did not provide as a part of said contract that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, as alleged in said petition. The defendants say that said contract as originally executed contained neither of said provisions, and that if it shall appear that by a subsequent modification of said contract such provisions were added to and became a part of said contract, then they say that the same were wholly without consideration.

Thirdly. And for a further defense in this behalf these defendants, protesting that the contract, dated June 23d, 1881, described in the petition, was made with the McGowan Pump Company, a corporation of Ohio, say that if it shall appear, upon the trial of this cause, that it was made with them as partners under the name of the McGowan Pump Company, then that on and before the 30th day of March, 1882, extra work, not required by said contract, to the amount of fifteen hundred and eighty-two dollars and fifty-one cents, had been furnished to the said American Tan Bark
21 Company, being the same extras described in the contract hereinafter copied, and that, in consideration of the transfer to the American Pressed Tan Bark Company of all the machinery embodied in the said contract of June 23rd, 1881, and said extras, with receipts in full for all material and machinery furnished T. G. McGowan and Bliss by other parties for steamer Tan Bark (the said contract of June 23rd, 1881, has been wholly released and discharged and other terms of agreement substituted therefor), by reason of the fact that on the 30th day of March, 1882, a contract was executed and delivered by and between the parties to the contract of June 23d, 1881, viz., the McGowan Pump Company and the American Pressed Tan Bark Company, and which contract of March 30th, 1882, if it shall turn out that it was made by the defendants as a partnership under the name of the McGowan Pump Company, was made and delivered for the benefit of the same McGowan Pump Company which executed the contract of June 23d, 1881, which contract is still in full force and binding between the parties, and is in the words and figures following, to wit:

"CINCINNATI, O., *March* 30, 1882.

"In consideration of $11,200 *dollars* to be paid us we hereby transfer to the American Pressed Tan Bark Company of New York
22 all the machinery embodied in our contract, and extras, with receipts in full for all material and mach'y furnished T. J. McGowan & Bliss by other parties for steamer "Tan Bark." The terms of this sale are as follows: To continue all former agreements and guaranties except time required to press bark into bales and removal from cylinders. We further agree to transfer to said Co. all special patterns made for our hyd. machinery, and also agree to transfer to said Co. our exclusive interest in the accumulator and double-end arrangement on hyd. press for bark purposes only. It is hereby agreed that the above guaranty, covering hyd. mach'y,

extends only to the strength of material *only* up to the fifteen hundred tons pressure. We hereby acknowledge receipt of four thousand dollars balance, to be paid on presentation of receipts as above.

"All erasures and changes made before signing.

"THE McGOWAN PUMP CO.
"AMERICAN PRESS TAN BARK CO.,
" By S. H. BEACH, *Attorney.*"

And the defendants further say that the four thousand dollars described in the petition as paid on the 30th day of March, 1882, was paid to the said McGowan Pump Comp. under and in pursuance of the said contract of March 30th, 1882, at the date of its exe-
23 cution, and is the same sum therein named and receipted for, but that no further or other payments have been made under said contract, although the same has been wholly complied with by the said McGowan Pump Company.

Fourthly. And by way of a fourth defense in this cause the defendants, protesting that the said contract of June 23rd, 1883, was made by the McGowan Pump Company, a corporation of Ohio, and not with the defendants as partners under the name of the McGowan Pump Company, nevertheless if it shall prove upon the trial of this cause that it was made with them in such partnership capacity, by way of further defense, say that in the month of March, 1882, the defendants took possession of and accepted the machinery constructed upon the said steamer " Tan Bark," as and for full performance of said contract, and waived any claim for further performance thereof, and have prevented the defendants from making further performance thereof, if such were necessary, which the defendants deny, by taking the same into their exclusive custody and possession, and have made divers and sundry charges in said machinery themselves, so as to prevent and render impossible any further performance thereof, if any such were necessary under said contract, and have
24 employed the McGowan Pump Company of Cincinnati, Ohio, being the same company which entered into the contract of June 23, 1881, described in the petition, to do work to be used in making other changes and alterations, which last-named work done by the McGowan Pump Company, and which, if said company turn out to have been a partnership, was done by the defendants as such partnership, amounts to the sum of $1,384.96 and $146.50, for which an action is now pending against the said plaintiff on behalf of the said McGowan Pump Company, as aforesaid ; and said defendants have removed said steamer " Tan Bark " and all said machinery so altered from the jurisdiction of this court and into the State of Tennessee, where the same now is, and have appropriated the same to their own use.

Wherefore these defendants pray to be hence dismissed with their costs.

HOADLY, JOHNSTON & COLSTON,
LINCOLN, STEPHENS & SLATTERY,
Attorneys for Defendants,

UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

Theodore J. McGowan, being by me first duly sworn, says
25 that he believes the statements of the foregoing amendment to answer to be true.

THEODORE J. McGOWAN.

Sworn to before me and subscribed in my presence this 5th day of April, 1883.

[SEAL.]

C. R. NEVIN,
Deputy Clerk U. S. Cir. C'rt, S. D. O.

And afterwards, to wit, on the 5th day of April, A. D. 1883, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid a certain demurrer to the amendment to answer in this cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE AMERICAN PRESSED TAN BARK COMPANY, a Corporation, &c., *vs.* THEODORE J. McGOWAN *et al.* } 3260.

And now comes said plaintiff and demurs severally to each and every of the defenses to *their* petition set forth and contained in the amended answer filed this day by leave of court herein, and for cause of demurrer say that said alleged defenses do not, nor
26 does either of them, contain facts sufficient to constitute a defense to the cause of action shown by the original petition.

McDOUGALL & LONGWORTH,
Plaintiff's Attorneys.

And afterwards, to wit, on the 5th day of April, A. D. 1883, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid its certain reply in this cause, which said reply is in the words and figures following, to wit:

Reply.

United States Circuit Court, Southern District of Ohio, Western Division.

THE AMERICAN PRESSED TAN BARK CO. *vs.* THEODORE J. McGOWAN *et al.* } 3260.

Money.

Plaintiff, for reply to the amended answer of defendants filed herein, and to the second defense therein set forth, says it denies

that the said provisions of said contract that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, as alleged in said petition, were wholly without consideration.

27 It denies each and every allegation contained in said second defense, and not herein or heretofore in said petition admitted to be true.

Plaintiff, for reply to the third defense therein set forth, says it avers that the said written instrument therein set forth was executed by and between the parties to this case on the said 30th day of March, 1882; it further avers it paid to the defendants the sum of four thousand ($4,000.00) dollars; and it denies each and every allegation therein contained and not herein in this reply or heretofore in said petition admitted to be true.

And plaintiff further says that said written instrument was signed and executed by it on the faith of representations made to it by the defendants at the time and prior to the execution of the same; that the said defendants had operated and tested said hydraulic machinery up to a pressure of one thousand tons, and that the bales of bark pressed by defendants on the trial made by them of said machinery on the 27th day of March, 1882, had received a pressure of one thousand tons from said machinery, and that said machinery as so constructed had been by the defendants operated under said pressure of one thousand tons.

That said representations so made by defendants were wholly untrue; that said defendants never did at any time operate

28 said machinery under a pressure of one thousand tons, and never did test said hydraulic machinery up to a pressure of one thousand tons, and never did give any bales of bark a pressure of one thousand tons, and that had plaintiff known said representations were untrue it would not have executed said written instrument.

Plaintiff further says that said hydraulic machinery never has worked and never will work up to a pressure of fifteen hundred tons; that the said machinery wholly fails to comply with the agreements and guarantees made by defendants as set forth in said petition.

Plaintiff further says that said written instrument was signed and executed by it on the faith of said representations made by defendants to it at the time and prior to the execution of the same; that on discovering the untruth of the same it immediately notified defendants that said alleged agreement therein set forth was null and void, and the same was thereupon abandoned by the parties thereto.

Plaintiff, for reply to the fourth defense, says it admits that it has removed the said steamer Tan Bark, with certain machinery thereon, from the jurisdiction of this court; it admits that it has made certain changes and alterations in a portion of said machinery;

29 it denies each and every allegation contained in said fourth ground of defense and not herein in this reply, as heretofore in said petition, admitted to be true.

It further says that defendants wholly failed and refused to comply with their said contract and wholly failed to make said machinery comply with the said purpose for which it was to be constructed, and, having refused to do any further work on said machinery, plaintiff made certains changes and alterations in order to improve said machinery and make said machinery operative for the purpose for which it was to be constructed, and all of which said changes and alterations were necessary to do so, and in order to do so plaintiff made contracts with various persons for the construction of said changes and alterations and incurred heavy expense in so doing.

Wherefore plaintiff prays as in its petition.

THE AMERICAN PRESSED TAN BARK CO.,
By McDOUGALL & LONGWORTH AND STALLO & KITTREDGE, *Att'ys.*

STATE OF OHIO, *Hamilton County,* } *ss:*

S. H. Beach, being duly sworn, says he is the duly authorized agent of plaintiff, which is a non-resident of this State, and the facts stated and allegations made in the foregoing reply are true, as he believes.

S. H. BEACH.

Sworn to before me and signed in my presence this 6th day of April, 1883.

[SEAL.]

C. R. NEVIN,
Deputy Clerk U. S. Circuit Court, S. D. O.

And afterwards, to wit, on the 5th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 6th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

31 *J'rn'l Entry, V.* 68.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 7th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 69.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being concluded, the court respited the jury until Monday morning next at eleven o'clock, to which time this cause is continued.

32 And afterwards, to wit, on the 9th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 69.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORD J. MCGOWAN, *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning *morning* at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 10th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry. V. 71.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. MCGOWAN *et al.*

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock.

33 And afterwards, to wit, on the 11th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 72.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. MCGOWAN *et al.*

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock.

And afterwards, to wit, on the 12th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 72.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. MCGOWAN *et al.*

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock.

34 And afterwards, to wit, on the 13th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 73.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 14th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 73.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until Monday morning at 10 o'clock, to which time this cause is continued.

35 And afterwards, to wit, on the 16th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 74.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at 10 o'clock, to which time this cause is continued.

And afterwards, to wit, on the 17th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 74.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled and sworn herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

36 And afterwards, to wit, on the 18th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 76.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, & affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 19th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 77.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

37 And afterwards, to wit, on the 20th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 77.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 21st day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 78.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until Monday morning at ten o'clock, to which time this cause is continued.

38 And afterwards, to wit, on the 23rd day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 80.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 24th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 80.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors

heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

39 And afterwards, to wit, on the 25th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 81.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 26th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 84.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

40 And afterwards, to wit, on the 27th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 85.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 28th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 86.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the testimony not being finished, the court respited the jury until Monday morning at ten o'clock, to which time this cause is continued.

41 And afterwards, to wit, on the 30th day of April, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 87.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, & affirmed herein, but, the testimony not being concluded, the court respited the jury until to-morrow morning at 9.30 o'clock, to which time this cause is continued.

And afterwards, to wit, on the 1st day of May, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 88.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. MCGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, and the testimony being finished, but the argument of counsel not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

42 And afterwards, to wit, on the 2nd day of May, A. D. 1883, a further entry was made upon the journal of said court in

said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 90.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, & affirmed herein, but, the argument of counsel not being concluded, the court respited the jury until tomorrow morning at 9.30 o'clock, to which time this cause is continued.

And afterwards, to wit, on the 3rd day of May, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 90.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, but, the argument of counsel not being finished, the court respited the jury until tomorrow morning at 9.30 o'clock, to which time this cause is continued.

43 And afterwards, to wit, on the 4th day of May, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 91.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, & affirmed herein, but, the argument of counsel not being concluded, the court respited the jury until tomorrow morning at 9.30 o'clock, to which time this cause is continued.

And afterwards, to wit, on the 5th day of May, A. D. 1883, a fur-

ther entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 92.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. MCGOWAN *et al.* }

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled & sworn and affirmed herein, and the argument of counsel having been concluded, but the court not having charged the jury, the court respited the jury until Monday
44 morning next at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 7th day of May, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 92.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. MCGOWAN *et al.* }

Money.

This day again came the parties, by their attorneys, also the jurors heretofore empaneled, sworn, and affirmed herein, who, having heard the evidence, the argument of counsel, and the charge of the court, retired to their room, attended by an officer of the court, to deliberate upon a verdict.

And afterwards, to wit, on the 8th day of May, A. D. 1883, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 92.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. MCGOWAN *et al.* }

Money.

This day again came the parties, by their attorneys, also
45 the jurors heretofore empaneled, sworn, and affirmed herein, who do find the issues to be in favor of the plaintiff, and do assess its damages by reason of the premises at the sum of eighteen thousand dollars ($18,000.00).

And afterwards, to wit, on the 9th day of May, A. D. 1883, came the defendants, by their attorneys, and filed in the clerk's office of the

court aforesaid a certain motion for a new trial in this cause, which said motion is in the words and figures following, to wit:

Motion for a New Trial.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

Now come the defendants and move the court to set aside the verdict rendered in this case and grant a new trial for the reasons following, to wit:

1st. That the court erred in the admission of incompetent testimony.

2nd. The court erred in the exclusion of competent testimony.

3rd. The court erred in instructing the jury.

4th. The court erred in refusing instructions asked for by the defendants.

46 5th. The verdict of the jury in contrary to the law.

6th. The verdict of the jury is contrary to the weight of the evidence.

7th. The damages are excessive.

And in case the above motion be not granted then the defendants move to arrest the judgment in this case.

And in case neither of the above motions are granted, then the defendants move the court to restrain the issue of execution in this case to the amount which shall remain after making the deduction of the amount sued for in the case of the McGowan Pump Company *versus* The American Pressed Tan Bark Company, number 3277 in this court.

HOADLY, JOHNSON & COLSTON,
LINCOLN, STEPHENS & SLATTERY,
Attorneys for Defendants.

And afterwards, to wit, on the 11th day of July, A. D. 1883, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry. Decree.

THE AMERICAN PRESSED TAN BARK CO.
vs.
THEODORE J. McGOWAN & ROBERT C. BLISS, Partners as the McGowan Pump Co. } 3260.

Money.

47 This cause came on for hearing upon the motion of the defendants for a new trial and in arrest of judgment, and to

suspend execution, and was argued by counsel, and the court, being fully advised in the premises, overrules said motion; to which action of the court in overruling said motion the defendants, by their counsel, except; whereupon, the plaintiff moving for judgment upon the verdict, it is ordered and adjudged that the plaintiff have and recover of the said defendants the sum of eighteen thousand dollars, the amount heretofore returned by the verdict of the jury, with interest and costs, and execution is awarded therefor; and upon application of the defendants, and by consent of the plaintiff, it is ordered that execution be stayed until the 29th day of September, 1883, to allow the defendants to prepare and present their bill of exceptions.

48 And afterwards, to wit, on the 29th day of September, A. D. 1883, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry, V. 134.

THE AMERICAN PRESSED TAN BARK CO. } 3260.
vs.
THEODORE J. McGOWAN *et al.* }

Money.

In this case a bill of exceptions is presented by the defendants signed, sealed, allowed, and made part of the record, and the court allows a writ of error to the Supreme Court, and with stay of execution, upon the filing of a super-deas bond in the sum of twenty-five thousand dollars ($25,000.00), with good and sufficient securities, to be approved by the clerk, within seven (7) days from this date.

Approved.

E. S. HAMMOND,
U. S. District Judge, &c.

49 And afterwards, to wit, on the 29th day of September, A. D. 1883, came the defendants, by their attorneys, and filed in the clerk's office of the court aforesaid a certain bill of exceptions in this cause, which said bill of exceptions is in the words and figures following, to wit:

Bill of Exceptions.

THE AMERICAN PRESSED TAN BARK COMPANY } 3260.
vs.
THEODORE J. McGOWAN *et al.* }

Money.

Be it remembered that at the trial of this cause at this term of the court, before the Honorable E. S. Hammond and a jury, the plaintiff, to maintain issue on his part, offered evidence tending to prove the execution of the contract dated June 23, 1881, which is made part hereof and marked "Exhibit A," and also offered evi-

dence tending to prove the writing of all the letters referred to herein, and which were offered in evidence by the parties, and that they were written by the parties whose names are signed thereto, and the due execution of all the other contracts referred to in this bill of exceptions and made part hereof. They also read in evidence the letter dated June 30th, 1881, a copy of which is hereto attached and made part hereof, and marked "Exhibit B," and also the letter of July 5th, 1881, a copy of which is hereto attached and made part hereof, and marked "Exhibit C;" to the introduction of each of which two last-named letters the defendants objected as they were offered, and their objections to each of the same were overruled, to which overruling they severally excepted at the time of the ruling upon each, and their exceptions were allowed.

The plaintiff also offered in evidence the letter of April 23d, 1881, a copy of which is hereto attached, made part hereof, and marked "Exhibit D," to the introduction of which letter the defendants excepted, and their exception was allowed.

The plaintiff offered in evidence the letter dated May 20th, 1881, a copy of which is hereto attached and made part hereof, and marked "Exhibit E."

The plaintiff also offered the contract for building the boat between him and James Mack, dated June 17th, 1881, a copy of which is hereto attached, made part hereof, and marked "Exhibit F," and offered evidence tending to prove that the said contract was drawn up in the office of the defendants and read over by the parties before signing in the presence of the defendants, and was left in their safe until some time in November, when said boat was launched by the said Mack, and evidence tending to show that defendants had agreed to superintend the erection and construction of the boat, and took upon themselves the supervision and control of the same, and undertook to accept the same for plaintiff, and that said boat was constructed for the purpose of receiving and operating the machinery of defendants according to plans of construction discussed between the agents of the plaintiff and Mack and the defendants, and approved by the defendants, and that defendants did superintend the construction of said boat and accept the same.

The plaintiff also offered in evidence the letter dated June 13th, 1881, a copy of which is hereto attached and made part hereof and marked "Exhibit G."

They also gave evidence tending to prove that the defendants were partners under and signed the name of T. J. McGowan and Bliss and The McGowan Pump Company, and tending to show that at the time the contract of June 23d was signed the defendants, upon being asked the reason for using the name of The McGowan Pump Company, said it was to retain the old name.

They also gave evidence tending to show defendants had negotiated with plaintiff as a firm under the name of The McGowan Pump Company prior to June 23d, 1881, and that the defendants contracted with the plaintiff June 23d, 1881, as a firm, under the

name of The McGowan Pump Company, and that all the
52 plaintiff's dealings with defendants were as such partnership.

They also offered evidence tending to show that the plaintiffs were a corporation duly organized under the laws of New Jersey, and owned valuable patents for the grinding and pressing of tan bark, which they expected to utilize in this machinery and the use thereof; also that on the 23d day of June the parties entered into the contract before referred to.

They also gave evidence tending to show that the machinery named in the said contract of June 23d, 1881, was not completely finished and put upon the said boat within the sixty days named in said contract, nor for a long time thereafter, and that when completed it was of insufficient material and not of sufficient power or strength to press a bale of tan bark with a pressure of fifteen hundred tons in two and one-half minutes, nor within any time; that the entire machinery was wholly insufficient to accomplish the purpose for which it was constructed, and was very rough, and was made in an unworkmanlike manner; that in consequence thereof they suffered great delay in the use of the said boat and machinery and great damage in having to expend a large sum of money upon the same, and that the plaintiff lost a very large sum of money by the breach of the said contract before it was finished, and after that
because of the insufficiency of the said machinery and its
53 defective character.

They also gave evidence tending to show that they had, prior to the 30th day of March, 1882, paid the defendants on account of said machinery and work $12,500, and that a few days after the signing of the contract of March 30, 1882, they paid $4,000 named therein, which contract the plaintiff read in evidence, which is made part hereof and hereto attached, marked "Exhibit H."

The letter of September 5, 1881, [was] put in evidence, a copy of which is attached hereto, made part hereof, and marked "Exhibit I."

The plaintiff also gave evidence tending to prove that no machinery was put in the boat on the 10th of November, 1881, and that there was nothing ready on the boat by December 5th, 1881.

The plaintiff also read in evidence the letter of December 22d, 1881, copy of which is hereto attached, made part hereof, and marked "Exhibit J."

Also dispatch of December 26th, 1881, copy of which is hereto attached & made part hereof, and marked "Exhibit K."

The letter of McGowan Pump Co., dated December 31, 1881, and the letters of January 4th and 16th, 1882, were read in evidence, copies of which are hereto attached and made part hereof, and marked "Exhibits L, M, and N."

54 The plaintiff also gave evidence tending to show that after they took possession of the boat and machinery they made additions thereto, costing them some $12,000, a part of which the defendants did for them under the contract of the 19th of April, 1882, which is hereto attached, made part hereof, and marked "Exhibit O."

Plaintiff also read the letter of March 15, 1882, which is made part hereof and attached hereto, & marked "Exhibit P."

The plaintiffs offered evidence of experts tending to show that the machinery and material of which it was constructed was poor and insufficient to sustain the required pressure; and upon cross-examination upon this point the said witnesses gave evidence tending to show that a single hydraulic cylinder could not be made of cast iron so [as] to bear 1,500 tons pressure; that the water would permeate and pass through the iron; and upon examination of the court evidence — tending to prove that it was not practicable to get such pressure with one cylinder of the kind, but that it might be done with three cylinders of a pressure of 500 tons each upon one platon. And on further cross-examination they gave evidence tending to show that water would force itself through cast iron at 700 tons pressure; that cast iron is not safe for more than 600 tons.

55 And the plaintiffs gave evidence tending to show that the machinery was only of the value of scrap.

The plaintiff also gave evidence tending to show that at and before the contract of March 30th, 1882, was entered into McGowan had stated that he had had a pressure, on previous tests, of 800 to 1,000 tons on the machinery in pressing bark, and that said representations were false, and that plaintiff was thereby induced to enter into said agreement.

Plaintiff gave evidence tending to show that the defendants had tested the machinery, and it was found defective on the 27th of March, 1882, before the execution of the contract of March 30th, and defendants gave evidence tending to show the contrary, and that they made no false representations, and that plaintiff knew from their employees present at the test what pressure it bore at the time, and reported to the plaintiff that it had never bourne a pressure of over 400 tons, and that there was no more on it at that time.

They gave evidence tending to show that McGowan claimed that the failure of the machinery was caused by the insufficient foundations of the boat, because the machinery was not adapted to the boat; that they had done all that was practicable under the condition of the boat upon which the machinery was to be placed. But the plaintiff gave evidence tending, on the contrary, to show that

56 it was practicable to construct such machinery of cast iron and place it upon said boat.

The plaintiff also examined one Kemplin, who resided in Chicago, and who was on board of the boat during the trip from Cincinnati to Paducah, and who testified that he was a hydraulic engineer, and had been engaged in the construction of steam engines and other machinery for many years, but had never built any steam engines to be used on the western rivers; that on the said trip he had seen the propelling machinery in operation, and had examined it during the trip, and he was asked what the value of propelling engines for such a boat would be, and what it would cost to make such propelling machinery good; to which the defendants objected on the ground that the witness was not competent to prove such facts; and the objection was overruled, and the defendants excepted thereto,

and their exception was allowed. Witness answered that the propelling machinery for the boat would have been worth, if constructed according to contract, $3,500, and that on the boat was worth about $300.00, a difference of $3,200; to which testimony the defendants objected, and their objection was overruled; to which overruling the defendants excepted, and their exception was allowed.

57 The defendants offered in evidence the 304th answer in the deposition of Frank Jones, which was objected to by the counsel for the plaintiff, & the evidence thereupon excluded; to which the defendants excepted, and their exception was allowed and made part of the record.

58 The evidence related to boat and machinery, & was as follows:

"Q. Do you know whether it was an experimental thing all the way through on his part and on the part of the company, so far as you heard expression from him on the subject?

A. So far as I heard, it was."

The defendants offered evidence tending to show that any such boat with machinery upon it had never before been known and used; that it had in no way been tested, and that it was an experiment. They also offered evidence tending to show that the plaintiff had possession of the said boat immediately after she came off the way, on or about the 1st of Nov., 1881, and received the boat from Mack, and that they had witnessed experiments of pressing bark made with the machinery in January, February, and in March, 1882, and were familiar with the condition, strength, and workmanship of the same before the entering in the contract of March 30th, 1882, and had knowledge before that of the amount of pressure which the defendants had used thereon.

The defendants offered in evidence the contract of March 30th, 1882, a copy of which has been made part hereof and marked "Exhibit H."

59 The defendants offered evidence tending to show that they were not boat-builders, had no knowledge of boats or of boat-building, as the plaintiff knew, and that defendants refused to take and responsibility about the boat and had nothing to do with planning, constructing, supervising, accepting, or controlling it or its foundations; that they supposed Mr. Mack would attend to that; that the boat was not launched or presented for the machinery until November, 1881; that they supposed that when they commenced to put the machinery upon it that it would be sufficiently strong; that the foundation, as they proceeded, proved wholly insufficient for that purpose, being too weak; that they reported it to the plaintiff's agents; that he said to them to go ahead and put it on and he would guarantee that they would stand; that the defects in the boat and the bad management of the machinery by the plaintiffs caused all the difficulty and breakage in the machinery, and all the expense in repairing; and in addition thereto the defendants also offered proof tending to show that the boat was not ready for their work until about the 10th of November, 1881, and that they used due diligence in the manufacture of the

machinery and in putting it upon the boat, and that the delay therein was due to the delay in finishing the boat and in the character of the boat when presented for the machinery to be put upon the same.

60 They also offered proof tending to show that the material of which the said machinery was constructed was of sufficient strength to work to 1,500 tons and more.

They also offered proof tending to show that in March and April, 1882, the plaintiff took possession and control of said machinery, and that it was built and set up on its boat by the defendants under the contract of June 23d, 1881, and afterwards, to make it more perfect, effectual, and useful, entered in the contract of April 19th, 1882, with the defendants, and the defendants furnished the labor and the material provided for in said contract and that the plaintiff used it on their said boat.

The defendants also gave evidence tending to show that the machinery for pressing of the bark was constructed of the very best cast iron, and that that was the only material of which said machinery is ever constructed; that the same was of the very highest and best character, and that the workmen upon it and the workmanship were of the highest and best character, and that they endeavored in every way they could to make this machinery as strong and as well as it could be made.

61 They also offered evidence tending to show that after the boat was launched and ready for the machinery they proceeded to put the machinery upon the boat, and thereafter they worked with due diligence in putting the same upon the said boat.

The defendants also offered proof tending to show that they had fulfilled their contract and were not liable to any damage to the plaintiff, but, on the contrary, the plaintiff owed them for said work, *and* under the agreement of March 30th, 1882, the sum of $8,731.68.

The defendants also offered evidence tending to show that they never examined Mack's contract, and that there was nothing said about the character of the foundations of such machinery; that they supposed that Mack being a boat-builder he knew what foundations for the machinery would be necessary.

They also gave evidence tending to show that the McGowan Pump Company was a corporation at the time of entering into the contract of June 23d, 1881, and was so acting in making the contract, and that the plaintiff was so informed of it before the signing of the contract.

They also offered evidence tending to show that before the contract of June 23d, 1881, was entered into the defendants had submitted to the plaintiff partial plans of machinery for pressing bark,

62 which were shown to one Kempling, an expert mechanic, who was a witness for plaintiff in this case, which plans exhibited a method of pressing bark with one cylinder, and one on each side to remove the bale from the cylinder when pressed. Copy of said plans are made part hereof and hereto attached, marked "Exhibit T."

They also offered in evidence the letter of May 8, 1881, a copy of

which is hereto attached, made part hereof, and marked "Exhibit Q."

They also offered in evidence the letter of October 17th, 1881, a copy of which is hereto attached, made part hereof, and marked "Exhibit R."

They also offered in evidence the letter dated Oct. 25th, 1881, a copy of which is hereto attached, made part hereof, and marked "Exhibit S."

They also offered evidence tending to show that the boat was not constructed to carry freight or passengers, and the propelling machinery was to be plain, unornamented machinery to propel the boat from landing to landing at a rate of from two to two and a half miles per hour, and that on her trip to Paducah and her trial trip upstream she did more than that; that when the boat was reported ready for delivery Mr. Beach caused a committee of experts to pass on her, who reported her defective in the particular set out in the letter of the McGowan Pump Co. of Oct. 17th.

63 All the letters of defendants, copies of which are attached in the exhibits, had the following letter-head printed on them:

Established 1862.

Theo. J. McGowan, R. C. Bliss.
Senior partner of late McGowan Bros.

Manufacturers of railroad water station supplies, water columns, tank valves, steam and power pumps, wrought and cast iron pipe, &c.

OFFICE OF THE McGOWAN PUMP CO.,
NOS. 141 AND 143 WEST SECOND STREET,
CINCINNATI, ——, 188–.

Being the printed letter-head that was in use prior to June 20th, 1881, except Exhibits D & Q, which had the same letter-head, omitting the word "the" before "McGowan Pump Co."

"EXHIBIT A."

CINCINNATI, O., *June 23d*, 1881.

The Am'r Pressed Tan Bark Co., of 240 Broadway, New York.

GENTLEMEN: We hereby propose to furnish you the following machinery:

1. 14" x 24" engine and all necessary trimmings for grinding bark.

64 2. 14" x 28" engine and all necessary trimmings for propelling boat.

3. 3 boilers, 42" x 26" and all necessary trimmings for propelling boat.

3 bark mills and all necessary trimmings and gearing.

1 bark elevator, 2 elevators with platforms for raising and lowering

pressed bark to and from hold of boats, to be provided with safety catches and unwinding device; 3 heaters—1 for bark engines, 1 for boat engines, and 1 for steam-pumps; 1 steam-pump for boiler feed, 1 deck hand-pump; 250 feet of rubber-hose, couplings, and 3 nozzles; 2 hoppers and scales to weigh bark; all the necessary shafting, hangers, pulleys, beltings, and all steam and escape pipes; also 1 20″ hyd. press and two 12″ hyd. presses with their necessary fixtures and connections, together with the necessary hyd. steam-pumps, tank, &c., for pressing bark into bales; all to be done in a workmanlike manner, and of first-class material, and set up aboard your boat in Cincinnati, Ohio, for the sum of twenty-three thousand seven hundred ($23,700.00) dollars, the above machinery to have a sufficient capacity to do the required work, and guaranteed *and* to pass Government inspection.

(Signed) THE McGOWAN PUMP CO.

To be completed in 60 days.

65 We accept the above.
Accepted June 23, 1881.
(Signed) AM'R. TAN BARK CO.,
By S. W. BEACH, *Att'y.*

"EXHIBIT B."

NEW YORK, *June* 30, 1881.

To the McGowan Pump Co., Cin'ti, Ohio:

Mr. S. W. Beach hands us contract for presses, engines, boilers, &c., &c., entirely satisfactory, as we understand—that is, that the capacity of the presses, &c., are in keeping with guarantee expressed in your letter of April 23, 1881, which we consider a part of your contract, in so far as guarantee of the presses are concerned. Please give us formal acknowledgement of same.

Yours respectfully, A. G. DARWIN,
Pres't A. P. T. B. Co.

EXHIBIT "C."

CINCINNATI, OHIO, *July* 5, 1881.

A. G. Darwin, N. Y.

DEAR SIR: Your favor of June 30th to hand and noted. Our contract is in accord with ours of April 23. Of course we do not know nor could we guarantee anything in reference to whether the
66 bark will bale or not, or weight or size of bale. That we consider an experiment, and can only be demonstrated by test.

Yours respectfully,
THE McGOWAN PUMP CO.

EXHIBIT "D."

CIN'TI, O., APRIL 23*d*, 1881.

A. G. Darwin.

DEAR SIR: We herewith submit plan for bark press, two views, one plan and the other elevation. They were gotten up in great haste and are not as full as they should be, but they show what our ideas are. The operation is 2 12″ hyd. presses, E E, one on each side of 20″ hyd. press D to remove the bark from containing cyl. G alternately after being pressed in 20″ hyd. press D. They pass from the hyd. press E to hyd. press D by a track, and are filled at top end from floor above, and the bale is also delivered from top end of containing cyl. on to the floor from which cylinders are filled. F is a chamber 40″ in diameter and 12 feet high, and is supplied with water and air by steam pump A, which keeps up a pressure in F to 300 lbs. to operate the hyd. presses rapid at beginning of the operation, and when the hyd. pumps B & C have raised the pressure in hyd. press beyond 300 lbs. the check-valves close and shut off connec-
67 tion between hyd. presses and pressure chamber. Then the hyd. pumps B & C complete the pressure until bale is pressed in 20″ press and bale removed from containing cyl. The hyd. pump C is used exclusively for 20″ hyd. press, and hyd. pump B is used for the two 12″ presses E E. The hyd. pumps are independent of each other, and each has its own steam cyl. The steam pumps use the water over again from tank from which it has been delivered from hyd. presses. The operation is about as follows: The containing cyl. is filled from upper floor — is run under 20″ press and pressed up to desired pressure; it is then run on track to 12″ press, where it is forced from containing cyl., which is again filled and operation repeated, and while cyl. is being emptied the other is going through 20″ press, and so on work is done very rapidly and well. 20″ press can be used up to 1,500 tons pressure.

Trusting this hurried explanation is satisfactory and that we may have your favors,

Yours, &c., THEO. J. McGOWAN & BLISS.

P. S.—Time required for each pressing and delivery of bale 2½ minutes. We guarantee the whole.

EXHIBIT "E."

CINCINNATI, O., *May 20th*, 1881.

A. G. D., Chicago:

68 Yours — 18th to hand, and contents noted. By enlarging press as per your suggestion (which we think very good) we are of opinion that we have large surplus power in presses, and almost agree with you in your ideas as to amount, but we are inexperienced with the nature of tan bark to press into a cylinder and removed therefrom, and have been governed entirely by the calculations given us by Mr. Hill, and we think there will have to be some little experimenting before you can accomplish just what you

want. We do not know how much compression there will be to make bale and weight required, nor how bulky the bark will be when loose to make bale of required size. We do know the motions can be made in 2½ minutes and the pressure 1,500 tons given, but what kind of bale it will be we do not know. We are constructing this machinery to make these bales 14″ x 16″, and not much clearance. We think it would be advisable to have more clearance made by extending columns further out to permit a large bale being made by enlarging cylinder, as you suggest. This would necessarily make the press cost more money. The bars would have to be extended further out and the castings made heavier to resist pressure. If you come to the conclusion to have enlargement made notify us at the earliest moment possible. We have now got scale drawings
69 about complete, and when the boat is procured or other selection made for erection we will have to add to our plan the supports for the support of presses to foundations. It will materially change our plans if changed from boat to land, as presses are very long, and on a shallow boat would throw them above main deck. Will be glad to see you.

(Signed) THE McGOWAN PUMP CO.

EXHIBIT F.

This agreement, made and entered into this 17 day of June, 1881, by and between James Mack, of the city of Cincinnati, O., party of the first part, and the Am'n Pressed Tan Bark Co., of 240 Broadway, of the city of New York, party of the second part, is as follows: Said party of the first part, for and in consideration of one dollar to him paid and for other considerations, as hereinafter mentioned, agree- to construct for said party of the second part such a boat as has been agreed upon for the purpose of carrying machinery for the prosecution of said business of said party of the second part. Said boat is to be built as follows and of the following size and material: Size 40 x 200 feet, with square bows and stern, or what is
70 termed scow build; depth of gunwale to be seven feet, with a water-tight bulkhead, one fore and one aft, of 8″ timber suitable for the purpose; the gunwale or sides of boat to be of pine or oak timber 12 inches thick at bottom, tapering to 8 inches at the top timber; the floor or bottom timbers to be of oak 4 x 8 inches, 16 inches from centres; planking for bottom and end to be of oak 4 inches in thickness, put on fore and aft, the whole to be decked with best pine lumber 3 inch- in thickness; deck beams to be 4 x 8 oak, 32 inches from centres; the hull to be lined with inch pine boards, loose, for supporting cargo; such timbers as are required for the support of machinery. Boilers and engines are to be supplied and put in place, as may be directed, in hull or upon decks and in such form as may be necessary for support of such machinery; deck to be well supported to carry heavy loads; the upper or boiler deck to be constructed of timber sufficiently strong and covered with pine lumber one inch in thickness, except where bark is to be handled, which is to be 2 inches; timber to be of pine or oak, and the whole

to be well supported and of sufficient strength to carry the necessary machinery and bark that may be placed upon it, and to be of such strength as shall be satisfactory to party of the second part; the height of boiler deck above main deck to be decide- by the
71 requirements of the machinery and as Theo. J. McGowan and Bliss may decide upon. The boiler deck at or near the stern is to [be] built [with] living rooms on either side of the boat, with necessary bunks for 26 men, and 2 or 3 extra rooms with bunks, 2 doors in each room with sash and glass; doors and bunks to be placed and so constructed as to meet the requirements of Government; also dining hall in centre of boat between rooms; also large kitchen pantries, sinks, &c.; two water-closets, all of which are to be made as Gov't requires; roof over all the boat with matched pine lumber, covered with canvass and same covered with composition, same as roofs of steamboats. Both decks are to be enclosed with good pine lumber and with the necessary openings for the prosecution of the business, to be closed with sliding doors; also to have necessary sash & glass for light, to be placed in boat as may be directed; also at least two pair of stairs to each deck above or on the roof, and at such place as may be required is to be constructed a large bin or room for the storage of ground bark, 20 x 30 feet, — high, with sufficient support for at least 40 tons of bark, besides necessary machinery; this to be well roofed and to be made water tight. Across the boat, at such points as may be necessary, are to be at least three partitions on each deck, said boat to be supplied with all necessary wood-work for motive power, including engine timbers;
72 water-wheel to be built and put in place; all iron machinery connected with same to be furnished by party of the second part; all necessary supports for water-wheel to be put in and the wheel to be put up in every way satisfactory; pitmans to be furnished, all except iron work; pilot-house to be put on where it may be best; boat to be supplied with necessary hog chains, at least one on each side from stem to stern, and such across the boat as may be necessary. Such openings in decks as may be thought necessary are to be made and supplied with hatches, this to be left to Theo. J. McGowan; all necessary timbers or bitts for attaching ropes, lines, anchors, and boats to be put in place; boat is to be well painted with at least 2 coats on outside, dark color, the inside of living rooms, hall, kitchen, pantries, &c., to be well painted; all such sash and glass as may be necessary in rooms and upon said boat to be furnished & put in place; also all necessary hardware for doors, windows, &c. It is hereby understood & agreed that in construction and finishing of boat, living rooms, & kitchen, & in everything pertaining to said equipment, said party of the first part is to meet the requirements of the Gover't, & is to give to said party of the second part in every respect such a boat as will meet the requirements of their business and be satisfactory in every respect;
73 workmanship is to be first class in every respect, and the timber used in construction to be of best quality of white oak or pine, such as is used in construction of boats; the construction and acceptance of said boat on the part of the party of [the]

second part is left with Theo. J. McGowan & Bliss; said boat, in accordance with the above, is to be finished and delivered afloat to party of the second part on or before August 26th, 1881, for which said party of first part agrees to receive, & said party of second part agrees to pay the sum of twelve thousand two hundred and fifty dollars ($12,250.00).

(Signed) JAMES MACK.
AM'N PRESSED TAN BARK CO.
S. H. BEACH, *Att'y.*

"EXHIBIT G."

OFFICE OF THE AMERICAN PRESSED TAN BARK CO.,
NEW YORK, *June 13th*, 1881.

GENTLEMEN: The bearer, Mr. Henry Beach, is hereby authorized to enter into contract for boats & press for this company; his acts will therefore be binding.

Yours very truly, A. G. DARWIN, *Pres't.*

To Theo. J. McGowan & Bliss, Cincinnati.

74 "EXHIBIT H."

CIN'TI, O., *M'ch* 30, 1882.

In consideration of $11,200.00, to be paid, we hereby transfer to the American Pressed Tan Bark Company of New York all the machinery embodied in our contract & extras, with receipt in full for all material & machinery furnished T. J. McGowan & Bliss by the parties for steamer "Tan Bark." The terms of this sale are as follows: To continue all former agreements and guarantees except time required to press bark into bales & removal from cylinders. We further agree to transfer to said Co. all special patterns made for our hyd. machinery, and also agree to transfer to the said Co. our exclusive interest in the accumulator & double-end arrangement on hyd. press for bark purposes only.

It is hereby agreed that the above guarantee covering hyd. machinery extends only to the strength of material only up to the 1,500 tons pressure. We hereby acknowledge receipt of four thousand ($4,000.00) dollars balance, to be paid on presentation of receipts as above.

THE McGOWAN PUMP CO.
AM'N PRESSED TAN BARK CO.,
By S. H. BEACH, *Att'y.*

75 "EXHIBIT I."

CINCINNATI, O., *Sept. 5th*, 1881.

S. H. Beach, att'y, New York:

Your favor of 3rd to hand & noted. Your Mr. McLain was here several days ago & took the data we had. There is not nor has there been enough water in our river to launch boat for a month, and appearances are against there being enough for some time to come

The machinery is not completed as yet to place on boat—delayed by non-arrival of iron. It will take from 4 to 6 weeks to put all the machinery aboard after she is launched. Mr. McLain stated if she was afloat ready for work Nov. 1st it would be in ample time. We are doing all in our power to push it, but, if you fear the rainy season, would advise sale of bark on hand. We have done our best. In first place, extreme heat prevented foundries making castings; then strike in rolling mills prevent- us from getting bar-iron, which we have not got yet; ordered June 27 and promised in ten days. These causes of delay were unavoidable on our part; we could not be held accountable for them. Mr. McLain said he was going to Chicago to meet Mr. Darwin, & was going to notify your office; consequently we did not write again; have not sent tracings, as some change had to be made, but will do so first possible moment.

76 Yours, etc.,

THE McGOWAN PUMP CO.

EXHIBIT J.

CINCINNATI, O., *Dec.* 22*d*, 1881.

S. H. Beach, N. Y.:

We beg to inform you that we have just this moment found the casting for the hydraulic pump to be good; we have been delayed in getting it, but now we go ahead; the other casting will be here Saturday; trust we shall [have] no further delay; river rising fast.

(Signed) THE McGOWAN PUMP CO.

"EXHIBIT K."

(Telegram.)

N. Y., *Dec.* 26*th*, 1881.

Telegraph to-morrow of progress; will presses be ready this week; if not, when?

(Signed) S. H. BEACH.

To the McGowan Pump Co.

"EXHIBIT L."

CINCINNATI, O., *Dec.* 31*st*, 1881.

S. H. Beach, N. York:

We this day have proved a casting and find it good; we will now by a process sweat it into the pump, & then put pump
77 on boat and give test; will telegraph Tuesday; think now we will get a test in few days.

THE McGOWAN PUMP CO.

"EXHIBIT M."

CINCINNATI, *Jan'y 4th*, 1882.

S. H. Beach, N. Y.:

We find pump is all right; now pushing all as fast as possible; would have been far advanced had we not had such unfortunate luck in getting good castings, but this none of us could foresee. We

will telegraph you when to leave, as it would be of no use for you to be here the next few days, as we will do as fast as we can.

THE McGOWAN PUMP CO.
JONES.

"EXHIBIT N."

CINCINNATI, O., *Jan'y 16th*, 1882.

S. H. Beach, N. York:

We write to-day if you will be here by Monday next, Jan'y 23rd; we will be in readiness for you; will telegraph if anything occurs to change this.

THE McGOWAN PUMP CO.

EXHIBIT O.

Memorandum of agreement made this 19th day of April,
78 1882, by and between the McGowan Pump Company, of Cin'ti, O., and the American Pressed Tan Bark Co., of New York, is as follows:

Said pump Co. agree to furnish all the wrought and cast iron work to be used in making certain alterations to machinery on the boat "Tan Bark," now in possession of the said American Pressed Tan Bark Co., as hereinafter described and at the following prices:

Cast iron of the following—

1st. Main support for presses and carrriage.
2nd. Carriage and wheels.
3rd. Kam heads to be put on.
4th. Bark pistons to be furnished with heads or renewed at option of American Pressed Tan Bark Co.
5th. New hanging piston from head block.
6th. Guides to bark cylinders.

All to be furnished and delivered in their shop at 6c. per pound.

Also the following wrought-iron work: The plates, angle-irons, coach screws, and rivets for foundations under presses, all to be finished as directed and delivered at their shop at the rate of 6½c. pr. pound.

All of the above work to be made in accordance with the plans and specifications as furnished by Mr. Kemplin and under his supervision; work to be begun at once and to be completed within twenty days, unavoidable delay in obtaining castings and drawings excepted. The work to be done in a good and workmanlike
79 manner to the satisfaction of Mr. Kemplin. Payments to be made in cash on completion of contract.

(Signed) T. J. McGOWAN, *Pres't.* [SEAL.]
AMERICAN PRESSED TAN BARK CO.,
By S. H. BEACH. [SEAL.]

(Here follows diagram marked p. 79.)

EXHIBIT P.

CINCINNATI, O., *M'ch 15th*, 1882.

A. G. Darwin, Ch'go, Ills.:

We have yours of yesterday ordering another press. Thanks; we will do our best to hurry it out. In regard to tan bark boat everything is completed except scales, which will be done to-morrow; we will then raise steam and if everything all right will telegraph you to come on.

THE McGOWAN PUMP CO.

EXHIBIT Q.

CINCINNATI, O., *May 8th*, 1881.

A. G. D., Chicago:

In answer to your telegram we telegraphed you to-day that we would build the machinery & place on foundations on boat for $20,000.00, and that we did not like to assume risk on boat, as it is out of our line. We gave you builders' net price on boat and there would be nothing in it to us. We propose to furnish 3 boilers with their settings, including chimney complete, engine 14x24
80 with heater, boilers, feeder, 2 bark mills with their shafting and gear wheels; 2 elevators, one to elevate ground bark and one to lower and raise bark after being pressed, including all belts and piping, & our presses and pumps all complete, set up on supports furnished in boat. The proposition for boat includes the supports for machinery. We hope to hear from you again to-morrow or next day, as the boat-builders will want to know by or before Saturday.

Yours, &c., THE McGOWAN PUMP COMPANY.

"EXHIBIT R."

CINCINNATI, O., *Oct. 17th*, 1881.

James Mack, Esq., city:

Some two weeks ago you notified us that the boat was ready for delivery. On examination we find there are 52 floor timbers broken and bottom plank is sprung off timbers; also hull is hogged and twisted, both ends down, and not sufficiently streak-bolted; also she is not sufficiently side stiffened, needing a side studding every 12 or 15 feet 8x8 of oak and 4 to 6 screw-bolts, with heavy washers on each; also a stern water-tight bulk-head athwart ship of 3″ pine. Owing to the timbers being broken it will be necessary to dock her. The fore and aft hog chains
81 are not of sufficient strength; they should not be less than $1\frac{3}{4}$″ iron; there should be one additional hog-chain or relief chain taking hold amidships in the rear of the opening for the hydraulic machinery running after under boiler deck and branching off under each propelling cylinder; pilot-house should be moved aft of hopper box and raised sufficiently for pilot to see forward. It is deemed necessary to be fully caulked over full deck from stem

to stern; also, for light and ventilation, to have skylight full length of cabin or dining-hall. We notified Mr. Beach, and he is now here and ready to pass on her, and we telegraph you to meet him here to-morrow morning at 9 o'clock. We ——. Above changes can be made and boat delivered.

Your early reply will oblige—

(Signed) McGOWAN PUMP CO.

EXHIBIT S.

NEW YORK, *Oct. 25th*, 1881.

The arrangement made for acceptance of and payment for boat does not meet the view of parties here, their views being that it should have my personal attention. You will therefor- telegraph me as soon as the boat is off of dock.

Also please telegraph when she is placed on dock. I shall endeavor to be on hand as soon as Mr. Mack is prepared to make
82 delivery, so as not to cause a moment's delay. Advise by telegraph. The advances made upon machinery will be only upon such as is placed upon board boat and in such a way as to give us absolute security.

Very respectfully, yours,

A. P. T. B. CO.
S. H. BEACH.

To McGowan Pump Co., Cincinnati.

The evidence having been closed, the plaintiff asked the court to charge the jury as follows:

1. If the jury find from the evidence that defendants, prior to the making of the contract of June 23rd, 1881, held themselves out to plaintiff as partners, and that plaintiff dealt with them as such prior to the making of said contract, and entered into said contract believing them to be a firm, and without notice of a corporation, then said defendants are liable on said contract, even though they should find that defendants were not, in fact, a firm, and that there was a corporation called "The McGowan Pump Company."

Which charge the court gave, and to the giving of which the defendant excepted, and his exception was allowed.

The plaintiff also asked the court to charge as follows:

2. "If the jury find, from the evidence, that the defend-
83 ants were, prior to June 23rd, 1881, doing business as partners under the name of 'The McGowan Pump Company' or "McGowan Pump Co.," and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability thereon, even if on that date a corporation existed called "The McGowan Pump Company," with which defendants may have been connected, and to which they had turned over their entire partnership business & assets."

Which charge the court gave, and to the giving of which the defendant excepted, and his exceptions were allowed.

The plaintiff also asked the court to charge the jury as follows:

4. "The jury are instructed, if they find for plaintiff, that they are not to make any deduction from the amount of damages which plaintiff is entitled to recover on account of any balance claimed to be due and unpaid on account of the contract made for said machinery or on account of any other contract, but they must return a verdict for plaintiff, if they so find, in such sum as will make plaintiff whole and compensate it for all losses and damages suffered by it as the direct result of defendant's breach of contract, and are not to make any deduction from said amount on account of
84 any contract whatever."

Which charge the court gave, to which the defendant excepted, and his exception was allowed.

The plaintiff also asked the court to charge the jury as follows:

5th. "The written contract, if the jury find it was made between the plaintiff and the defendant, requires the machinery to be made under it to be constructed in a workmanlike manner and of first-class materials and to be set up aboard of the plaintiff's boat in Cincinnati, O. The machinery is to have sufficient capacity to do the required work, and is guaranteed by the McGowan Pump Company. The contract having thus defined the character of the work it cannot in that respect be varied by parol evidence, which is admissable only to enable us to properly interpret the contract. It required the machinery to be constructed in a workmanlike manner and of first-class materials."

Which charge the court gave, inserting the words "which is admissable only to enable us to properly interpret the contract;" to the giving of which charge the defendant excepted, and his exception was allowed.

The plaintiff also asked the court to charge the jury as follows:

6th. "The machinery being constructed to be set up on the
85 plaintiff's boat it is for the jury to determine what the boat was that was referred to, and if the boat intended was one provided to be constructed by one James Mack of a kind, and of dimensions, and with bulk-heads of foundations then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulk-heads so defined and understood by the parties (either) for rendering (the foundations sufficient or) the machinery stable to do the required work when set up aboard the boat."

Which charge the court gave, striking out the words "either," on the fourth line from the battom, and "the foundations sufficient or;" to the giving of which charge the defendants excepted, and the exception was allowed.

The plaintiff also asked the court to charge the jury as follows:

7th. "If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April 23rd

and July 5th, 1883, then while the McGowan Pump Company did not guarantee that bark would bale, it did guarantee to furnish a practical machine set up on board of the boat that was capable in its design and in all its parts of being worked to apply 1,500
86 tons pressure to press a bale of bark every two and one-half minutes, or within a reasonable time, if the contract of March 30 be valid and capable with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such mechanism constructed for similar uses."

Which charge the court gave (inserting the words "or within a reasonable time if the contract of March 30 be valid"), and the defendants excepted to the giving of said charge, and their exception was allowed.

The plaintiffs also asked the court to charge the jury as follows:

8th. "In respect to the alleged contract of March 30th, 1882, if the jury find that this contract was made by the plaintiff upon the faith of and induced by representations made by the defendants that the machinery had been worked under a pressure of 1,000 or 800 tons, and such representations were not true in fact, then that contract is not obligatory upon the plaintiff."

Which charge the court gave, and the defendants excepted to the giving of such charge and their exceptions were allowed.

The plaintiff also asked the court to charge the jury as follows:

10th. "If the jury find that the contract of March 30, 1882,
87 was duly made and is binding between the parties, it in no wise affects the right of the plaintiff to recover for any breach of the original agreement between the parties upon which this action is founded, or of the guarantees contained in such original agreement, except for the failure in respect to the time required to press bark with the machinery into bales, and to remove them from the cylinders. All the other obligations and guarantees of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30th, 1882."

Which charge the court gave, and the defendants excepted, and their exception was allowed.

And for a 14th special charge the plaintiff asked the court to charge the jury as follows:

14th. "If the jury find that the contract—made as alleged with defendants, and that after the day named for the completion of the contract, the work not being then completed, that the boat was not then in readiness to receive it; yet if the boat was thereafter made ready by James Mack, and the defendants proceed under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement and such additional time as may have been lost in the prosecution of the work,
88 occasioned by Mack's delay in the construction of the boat, and failing in this they are liable for the consequences of such

failure and delay. [And if one of the consequences of such delay by the defendants, which was reasonably within the contemplation of the parties at the time, was the loss of the bark in question, the defendants would be liable for such loss."]

Which charge the court gave, excepting therefrom the portion enclosed in brackets, to which charge, as given, the defendants excepted, and their exception was allowed.

And the defendants asked the court to charge the jury as follows:

"If the McGowan Pump Company, which entered into the contract of June 23d, 1881, was in fact an incorporated company and not a partnership, then the plaintiff cannot recover in this case, whether the plaintiff supposed it to be a partnership or not."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

4th. "That the contract sued on is entire and entitled the plaintiff to have the machinery therein described built and set up on board a boat to be furnished by the plaintiff within 60 days
89 from June 23d, 1881, and that if the plaintiff failed to furnish such boat until after the said period of 60 days from June 23d, 1881, had expired, and by reason of such failure the defendants were unable to begin to set up such machinery on board said boat until after the expiration of said period of 60 days from June, 1881, then the defendants are entitled to recover."

Which charge the court refused to give, and the defendants excepted to such refusal, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

5. "That the plaintiff cannot recover upon the issue in this cause if it appear to the jury from this testimony that the contract which has been read in evidence, bearing date March 30th, 1882, was in good faith executed and delivered by both the parties to this cause."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

10. "That the plaintiff does not entitle itself to recover upon the contract of June 23d, 1881, by showing that the defendants failed to comply with the contract of March 30th, 1882."

90 Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

The defendants also asked the court to charge the jury as follows:

"That even if it be true and believed by the jury from the testimony that the contract of March 30th, 1882, was broken by the defendants by non-delivery of the receipts or of assignments of patent rights therein described, nevertheless such breach does not entitle

the plaintiff to recover in this case upon the contract of June 23d, 1881."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

12. "A breach of the contract of March 30th, 1882, entitles the party who did not break such contract, if it suffered damages by reason of such breach, to recover in an action for such damages founded upon such contract, but it furnishes no ground for recovery in this case upon the contract of June 23d, 1881, for damages suffered by reason of a breach of the last-named contract."

Which charge the court refused to give, to which refusal the counsel for the defendants excepted, and his exception was allowed.

91 And the defendants also asked the court to charge the jury as follows:

14. "That by the contract of March 30th, 1882, the parties waived and withdrew all previous agreements and guarantees relating to the hydraulic machinery, except only that the material of which it was composed had sufficient strength to work up to a total
1500 pressure of (a thousand) tons, and that the defendants are not liable to damages in this action for any defect in said hydraulic machinery if said material had sufficient strength to work up to such pressure, unless under the charge of the court the jury believe from the testimony that the said contract was procured by fraud of false representation, and is therefore not binding upon the plaintiff."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

"That if in March and April, 1882, the plaintiff took into its possession and control the machinery built and set up on its boat by the defendants under the contract of June 23d, 1881, and afterwards, for the purpose of making the same more efficient and useful, entered into the contract of April 19th, 1882, with the defendants,
92 and the defendants furnished the labor and delivered the materials provided for by said contract of April 19th, 1882, and the plaintiff received the same and appropriated it to its own use, then and thereby the plaintiff waived all claim for damages for any defects in said machinery which were corrected or relieved by the execution of the contract of April 19th, 1882, or by the labor and materials furnished under it, but, on the contrary, *are* liable to pay the defendants for said labor and materials at the prices fixed by said contract of April 19th, 1882."

Which charge the court refused to give, and the defendants excepted to such refus*ed*, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

18. "If the machinery contracted for in this case was in fact incapable of working up to the pressure of 1,500 tons, required by contracts between the parties, and this incapacity resulted not from any — of workmanship or construction, but from the fact that such machinery of the characted and description provided for by said contracts cannot be made capable of working up to such pressure, and if the machinery was in fact made of first-class material and in a workmanlike manner, and was capable of receiving the
93 greatest pressure machinery of the description called for by said contract could be made to work up to, then the fact that this said machinery will not work up to such pressure does not entitle the plaintiff to recover and damages based on such incapacity to work up to such pressure."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

21. "We ask the court to charge the jury that if the boat was not ready for the machinery in time to have the same put up within sixty days from the date of the contract, but that the parties subsequently proceeded at the request of Beach to put the machinery upon the boat, they were only bound to proceed with reasonable diligence under the circumstances, and were not bound to complete the same within sixty days thereafter if the boat or the foundations provided for the machinery were so insufficient as to prevent such completion within said time."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

And the defendants also asked the court to charge the jury as follows:

94 22. "That the plaintiffs, by their contract of June 23d, 1881, contracted for the specific machinery set out therein, and could not require other and different machinery of the defendants, and if it appears in the evidence that the parties were both laboring under a mistake as to its capacity, and that the same was not capable of producing the result expected or contemplated, then, if the defendants have completed the said machinery of the best material and of the best workmanship, the plaintiffs cannot under such agreement recover damages for not producing what was not possible in reference to such machinery thus contracted for."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

The defendants also asked the court to instruct the jury as follows:

23. "That, as the machinery was to be put up on a boat to be furnished by the plaintiff, *that* to require of the defendants that they

have the machinery finished and put up on the boat within the sixty days the plaintiffs must have had the boat ready and fit for the purpose in time to enable the defendants to have put the machinery in place upon the boat, the same being ready therefor within
95 the sixty days, and if the boat was not ready in such time, then the plaintiffs cannot recover damages for not having the said machinery so completed within sixty days. In such case the defendants were only bound to proceed with due diligence under the circumstances," &c.

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

The defendants also asked the court to charge the jury as follows:

24. "If the plaintiff knew that the defendants had no knowledge of boats or boat-building, and in the negotiations relating to the contract of June 23d, 1881, refused to take any responsibility in relation to the boat, and informed the plaintiff that they had no knowledge of boats or boat-building, and would take no responsibility as to the boat except to communicate between them and Mack, then the said contract cannot be held to make the defendants in any way responsible for the sufficiency of the boat or its foundations for the successful operation of the said machinery."

Which charge the court refused to give, and to which refusal the defendants excepted, and their exception was allowed.

The defendants also requested the court to charge the jury as follows:

96 "That the guarantee referred to in the contract of June 23d, 1881, is a guarantee of the machinery to be made and not a guarantee as to its operation upon the boat which the plaintiff might present for that purpose to the defendants."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

The defendants also asked the court to charge the jury as follows:

28. "If it appear in this case that the machinery contracted for in the contract of March 30th, 1882, was not possible to be made as working machinery because the material of which it was to be made was not capable of sustaining any such working pressure, yet that the material used by the defendants was of the strength of 1,500 tons, then the contract of the 30th March, 1882, must be construed as relating to the strength of the material and not to the working capacity of the machinery."

Which charge the court refused to give, to which refusal the defendants excepted, and their exception was allowed.

The defendants also asked the court to charge the jury as follows:

31. "If the agent of the plaintiffs sent here to make contract for

this work did contract with the McGowan Pump Company
97 and had it explained to him that the said company had organized as a corporation and the defendants went on under said corporation and did the work provided for, which the plaintiff subsequently took from said corporation, they cannot now deny that they dealt with the said corporation."

Which charge the court refused to give, and to which refusal the defendants excepted, and their exception was allowed.

32. The defendants also requested the court to charge the jury as follows:

"Unless the contract of March 30th, 1882, be set aside by the jury for the alleged fraud, then the plaintiffs cannot recover for any damages resulting from delays in the construction of the machinery."

Which charge, as asked, the court refused to give, but did give, adding the following at the end thereof:

"Except the expense of keeping the boat."

The defendants also excepted to the following parts of the general charge:

"But if you find that within the range of mechanical art such pressure could have been delivered to the bark it was their obligation to do it. The whole field of mechanical engineering was open to them, except so far as it was restricted by the necessity of placing
98 the machine upon a floating foundation to be furnished by the plaintiffs, of which more hereafter will be given you in charge. They were not restricted in plans, specifications, or materials, and were bound to select such plans and materials as were available and capable of doing the work. It was their misfortune if the price demanded was not sufficient to cover the cost; but that fact, if it be one, cannot relieve them. In short, they contracted as mechanical engineers and as manufacturers and are bound by the contract as they made it in this respect."

The defendants also excepted to the following parts of charge relating to the contract of March 30th, 1882:

"But the plaintiff has not sued on that contract nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine and nothing else. This contract is pleaded by defendants as a defense to a claim of breach, and so setting it up the only question in whether it constitutes a defense. It is only a supplemental contract to that of June 23rd. It continues the guarantees of that contract with the execution as to time. It does not make new guarantees for a new consideration, but obligates the defendants to carry out the old contract with the named exception and imposes on defendants new obligations about the
99 patterns, etc., which are independent and seperable from the old contract and the old consideration. The court therefore charges you that its only effect is to reduce the original guaranty for the capacity of the machine in respect to the time for pressing the bale if you find there was no fraud in procuring it; if there was such fraud it leaves that guaranty still in force."

The defendants also excepted to the following portion of the general charge:

"The defendants claim that its proper construction requires that 1,500 tons only applies to strength of material to endure that pressure as a maximum of endurance, not for a continuous working pressure. It belonged to the plaintiff to say what it wanted and to defendants to consider it when they made the contract, whether they could give that which was wanted. There is no proof tending to show that the proper construction is that the plaintiff only wanted a machine of sufficient strength to endure a test of 1,500 tons; but, on the contrary, read in the light of the circumstances proved, the language of the contract clearly means that the plaintiff wanted a machine by which they could deliver on each and every bale a compression of 1,500 tons if they chose so to use it, and which would endure the work for the length of time such a machine would
100 wear under prudent and reasonable management by the plaintiff."

The defendants also excepted to the following portion of the general charge:

"The machinery being contracted to be set up on the plaintiff's boat, it is for the jury to determine what the boat was that was referred to, and if the boat intended was one provided to be constructed by one James Mack of a kind and dimensions and with bulkheads or foundations then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulkheads so defined and understood by the required work when set up aboard the boat."

The defendants also excepted to the following portion of the general charge:

"If the jury find the contract was made, as alleged, with the defendants, and that after the day named for the completion of the contract, the work not being then completed, that the boat was not then in readiness to receive it, yet if the boat was thereafter made ready by Mr. Mack, and the defendants proceeded under the contract, they were then bound to complete it within the same
101 length of time contemplated by the original agreement and such additional time as may have been lost in the prosecution of the work occasioned by Mack's delay in the construction of the boat, and failing in this they are liable for the consequence of such failure and delay. Therefore the court charges you that the defendants are only liable for any damage caused by delay for the period of delay found by application of the above rule to the proof in this case."

The defendants also excepted to the following portion of the general charge:

"If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April 23rd and July 5th, 1881, then while the McGowan Pump Co. did not guarantee that bark would bale, it did guarantee to furnish a practical

machine, set up on board of the boat, that was capable in its design and in all its parts of being worked to apply 1,500 tons pressure to press a bale of bark every two and one-half minutes, or within a reasonable time, if the contract of March 30th be valid, and capable, with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such machinery contracted for similar uses."

102 The defendants also excepted to the following portion of the general charge:

"If the jury find that the contract of March 30th, 1882, was duly made and is binding between the parties, it in nowise affects the right of the plaintiff to recover for any breach of the original agreement between the parties upon which this action is founded, or of the guarantees contained in such original agreement, except for the failure in respect to the time required to press bark with the machinery into bales and to remove them from the cylinders. All the other obligations and guarantees of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30th, 1882."

The following is the whole of the general charge, which is inserted herein at the request of the plaintiff:

Charge of the Court.

U. S. Circuit Court.

AMERICAN PRESSED TAN BARK COMPANY
vs.
THEODORE J. McGOWAN *et al.* } 3260.

Money.

CINCINNATI, HAM. CO., OHIO, *May 7th*, 1883.

103 GENTLEMEN OF THE JURY:

It may be doubted if the importance of this case is commensurate with the time consumed in the protracted trial we have had. But when we consider that the machine in controversy in this case is not only complex in its construction, but novel in its uses, it being said there was none other like it; that it consists of a steamboat of peculiar construction, with machinery to propel it; of an hydraulic press of unusual design, intended to supply a power of compression rarely ever used for any purpose, certainly not in ordinary mechanical appliances; that it was intended to produce for the first time an article hitherto unknown to commerce, namely, ground tan bark compressed into coherent, self-sustaining bales or blocks of a specific gravity greater than water; that other machines for grinding the bark and conveying it to this compress were included, and all driven by steam engines constructed for the purpose; that this immense movable machine was a new creation from kelson to chimey top,

which has been subjected to a criticism of its mechanism so full that scarcely a plank, nut, or bolt has escaped scientific observation; that the plaintiff alleges that it has expended on this machine something over forty-five thousand dollars ($45,000.00) and about fourteen thousand dollars ($14,000.00) for the purchase of bark to be
104 ground and pressed with it on the Tennessee river, and that by the failure of defendants to skilfully construct all that portion of this machine which they agreed to supply and within the time specified by the contract it has been damaged more than fifty thousand dollars ($50,000.00), while the defendants claim that they have fully performed their contract, and so far from owing the plaintiff anything for damages there is due them unpaid purchase-money amonting to about ten thousand dollars ($10,000.00); that besides this the case has the usual complications of carelessly-worded contracts, their alleged alteration or abandonment, and questions of disputed partnership, questions of estoppel, and the like, and that eminent counsel retained on either side have thought it worth while to devote five weeks of their valuable time continuously, industriously, and exclusively to taking the proof and delivering their arguments—with models, parcels of the machine, and samples of the product before us—it cannot be taken for granted that we have wasted our time, be the result what it may, unless you should unhappily disagree about your verdict. At all events, no complaint can be made that you have not, with desire to do justice to the parties, at great personal inconvenience and sacrifice given them a
105 patient and careful hearing. And it may not be out of place here to congratulate ourselves that, with the exception of one elderly gentleman on your panel who was compelled to retire before he had reached the "bursting strain," our own physical and mental mechanism has borne the "test of tensile strength" demanded of us by our obligations to "withstand the pressure" and to "do the required work" of trying this case.

Plaintiffs corporation.

The plaintiffs having complained of damages to its business by loss of profits, and the defendants having claimed that the plaintiff had no established business, but were only engaged in an Utopian project with imaginary "millions in it," for the loss of which they were not liable, the court thought it proper to permit an inquiry into the true character of the plaintiff corporation, including an investigation of its organization and capital stock. But this inquiry was, and should by you be, limited to its influence on the measure of damages.

It can have no other influence whatever, and as to that will be subsequently explained. It cannot in the least be permitted to affect the plaintiff's right to recover whatever actual damage
106 it has sustained, if any, by the breach, if breach there be, of defendants' contract, and it is the duty of the court to caution you against such use of that testimony.

Something has been said about its being a New Jersey corporation, but you should understand that local prejudice should not influence

any jury, and certainly not those in the courts of the United States, which exist, so far as this class of jurisdiction is concerned, solely to try *concerned solely to try* controversies between citizens of different States, and they can try no others, and there — to avoid all seeming influence of local prejudice.

Contractual relation of the pa-ties.

The plaintiff has said the defendants, as partners —, and can recover against them only as individuals, jointly, equally, and severally liable upon their contract. The two defendants, McGowan and Bliss, undeniably negotiated and executed the contract, but whether as individuals or as the representatives and agents of a corporation is the question you are to determine. On the facts of this case, which are not disputed, the law charges them as partners in their liability on the contract with the plaintiff, unless they have established by proof that they were in making the contract
107 only the agents of a corporation, and disclosed their agency to the plaintiff, or that this in fact was otherwise known to the plaintiffs.

It is wholly immaterial if they were in fact partners, or held themselves out to the plaintiffs as partners, which is precisely the same thing as if they were partners in fact, by what name they did their business or made this contract; whether they were known or contracted as "Theodore J. McGowan & Bliss," as "McGowan Pump Company," or as "The McGowan Pump Company," or whether they used any or all of these names indifferently or interchangeably.

Now, if they held themselves out to the plaintiff as partners it is important whether they were a corporation or not in fact.

Your inquiries are—

1st. Were they partners in fact in making this contract? If so, they would be liable as partners.

2nd. Did they hold themselves out to the plaintiff as partners? If so, they would be liable in that relation.

3rd. Were they in fact the authorized agents or representatives of a corporation competent to contract as a corporation, or did they assume to be so authorized, and in that representative capac-
108 ity make this contract? If so, they cannot be held as partners, provided they disclosed their agency to the agents acting about this business for the plaintiff corporation, namely, Darwin, Beach, or Hill, or any of them, or if these agents of the plaintiff corporation otherwise knew that fact. If the jury find that on the 23rd of June, 1881, there was in existence a corporation called "The McGowan Pump Co.," qualified to do business, and that when the contract of that date was signed in that name, and that the defendants were authorized to act for it, and informed Beach that it was that corporation making the contract, the verdict must be for the defendants, because the corporation is not here sued.

And in ascertaining whether the corporation existed in fact, if you find that the entire amount of capital stock of "The McGowan Pump Company" was subscribed, and the subscribers met and elected directors, and the directors elected Theodore J. McGowan

president and Robert C. Bliss secretary, and said president and secretary made the contract of June 23rd, 1881, in the name of "The McGowan Pump Company," and informed the agent of the plaintiff at the time that "The McGowan Pump Comp-ny" was a corporation, and was contracting in that capacity, then the defendants are
109 entitled to a verdict, notwithstanding it may appear to the jury that the subscribers to the articles of incorporation failed to certify to the secretary of state, as required by law, that said subscription of stock had been made. But as a corporation in Ohio can only act by or under the authority of its board of directors, and on the 23rd June, 1881, there is no evidence tending to show any action of the board of the corporation known as the McGowan Pump Company authorizing the contract in this case to be made, and authorizing either McGowan & Bliss to contract for the corporation, you should consider the fact that they had no such authority on that date to make a contract for the corporation in determining whether they did in fact undertake to contract for the corporation, and whether the signature to said contract was the signature of the corporation or of the defendants as partners. But, while you should give this fact its due weight, also — fact that the final organization sught to be proved was only a few days prior to the contract, together with all the other facts relating to the formation of the corporation, it is proper to say that in the opinion of the court the want of direct authority conferred by a board of directors would not, in this controversy, so affect the contract as to convert it into one
110 of partnership, because that is a question between the corporation and its officers assuming to act for it; wherefore if you find that, notwithstanding this want of authority, the defendants assumed in their corporate capacity to contract with the plaintiffs, and notified Beach that they were so assuming to act, or he otherwise knew it, your verdict must be for the defendants irrespective of any want of authority. This point of notifying Beach is one of direct conflict of testimony between the parties which you must settle under the rules to be hereafter mentioned, the court being content to say here that it is a matter in this lawsuit of paramount importance to both parties which demands your most careful consideration.

In determining these questions submitted to you on this branch of the case you may look to all the facts in proof having any bearing on the questions. It is my custom in instructing a jury to say the least possible about the details of the evidence, lest the court should exercise undue influence on the jury by unintentional emphasis of mention or unintentional omission of all mention, and thereby using the functions of the jury. But it is necessary sometimes to call your attention specifically to evidence in order
111 that you may know how to deal with it; &, cautioning you that what I am about to mention is only mentioned to explain it, and not to add to or take away from the weight which you alone must give it, I invite your attention to certain features of the evidence on this branch of the case.

From the origin of the transaction in controversy in this case,

found in Darwin's letter of March the 12th, 1881, and even prior to that time, as shown by the defendants' dealings with him as president of another company, it is undisputed that the defendants dealt in the negotiations with the plaintiff's agent as partners, no matter under what name, until, at the very earliest, about the 20th May, when the alleged transfer of assets to the corporation is said to have taken place, and it may be you will find in the disputed facts that they so dealt down to about June 20th, 1881, when the minutes of corporate organization, in proof before, show that a more complete organization was attempted or perfected.

The exact status of this corporation between these dates might be under some circumstances a matter of grave importance, as to which it would be the duty of the court to instruct you more fully.

But here the court has, in the instructions already given, indicated the greatest influence it can have on this issue between the
112 parties. Perhaps a fuller explanation of the legal effect of the proof about the status of this corporation may aid you. It cannot be denied that the defendants were partners from the date of their partnership articles to the dissolution of the partnership by the substitution of a corporation; now can it be denied that as early as 1880, more than a year before this transaction began, the defendants took the primary step to organize a corporation, but nothing more until May or June, 1881, a short time before this contract was made; but it is equally undeniable that they negotiated and dealt with plaintiffs as partners—necessarily so—until the corporation was more thoroughly established than it was by this primary step. Now, there is no proof tending to show the plaintiff's agents had any sort of knowledge of the corporate existence of "The McGowan Pump Company," in fact, down to the very moment of signing the contract of June 23, 1881, when the defendants testify they told Beach of it, and that they were contracting as [a] corporation, which is denied by the plaintiff.

What is the effect of any constructive notice implied by law from the record of the certificate filed in 1880, at Columbus, in the
113 office of the secretary of state, and the advertisement of notice of a corporation published in the newspapers? you will naturally ask. The court answers, None whatever, in view of the special facts of this case, which are not disputed.

There is no proof whatever that plaintiff's agents had any actual knowledge of the certificate at Columbus or the advertisement. There is no proof whatever that they were ever informed by defendants of their own corporate capacity, be it what it may, at any time prior to the signing of the contract, or that by other means they had such information. Therefore the court charges you that by their relations—in fact, the course of their dealings with the plaintiff, as shown by their letters and repeated interviews with each other throughout the negotiations, from the beginning to the moment of signing the contract—the defendants are estopped, in fact and law, to deny that, as to the plaintiff, they were partners in making the contract, unless you believe that they then disclosed their corporate character to Beach. If you find that to be a fact, the court has

already told you that your verdicts should be absolutely for the defendants. If you do not find that to be a fact, but, on the contrary, believe the plaintiff's proof that no such disclosure was made, the defendants are liable as partners for whatever damages you
114 may find for the plaintiff on the merits of the case.

This view of the case renders the voluminous proof as to the alleged admissions on the question of partnership or corporation contained in the letters, interviews, memoranda of compromise negotiations, depositions in the Poage suit, petitions in the defendants' suit for money due in the contract, & the like of somewhat less importance than it otherwise might be, but it does not eliminate that proof & the questions arising on it from the case. These subsequent admissions and conduct of the defendants cannot in the least break the force of the estoppel on them in this partnership matter if they did not disclose their changed relations to each other to Beach at the time of signing the contract. If they made that disclosure this proof of subsequent conduct is, as to them, or as to the plaintiff, of no consequence, & is equally valueless to either if they did not make it, because the fact of partnership must be tried as of the date of the contract and not subsequently. It is immeterial what the subsequent relations of the defendants to each other may have been; one having contracted with plaintiff as partners they cannot change that contractual relation without plaintiff's consent, and there is no proof of this. But in determining the vital question of fact
115 whether they did or did not make a disclosure of corporate existence and corporate contract this proof of subsequent conduct is of obvious importance.

If defendants went on dealing as partners with the plaintiff and the public generally—if they continued to call themselves partners, to write, print, negotiate, and sue in the courts as partners—it is evidence tending to show that they did not make the alleged disclosure. If, on the other hand, they were at that time a fully organized or a partially organized or inc*oh*ate corporation and subsequently they proceeded to *be* perfect their organization, to deal between themselves, with the plaintiff, with the public generally, as a corporation and not as partners; if they called themselves by a corporate name; if they wrote, printed, negotiated, and sued in court as a corporation, it is evidence tending to show that they did in fact disclose their corporate capacity as alleged, and irregularities of corporate organization or action are unimportant. How far these facts go to establish the one side or the other of this dis*qui*ted question of fact and their weight as evidence is for you to determine. All admissions made by a party of a fact are proof of its existence, and if you find in determining whether these defendants continued to deal, as in-
116 dicated, as partners or as a corporation they admitted the fact one way or the other it is evidence more or less strong, according to circumstances. Admissions made without knowledge, hastily, inadvertantly, or by mistake are not of as much value as if made knowingly and deliberately, but of their value you must judge according to the circumstances surrounding each occasion of admission. So as to all alleged admissions of defendant- that they

extend into this particular contract as partners. Of course such admissions go to show that they did.

Again, where a man not only admits a fact, but swears to it, it becomes a parcel of evidence of far more value, because a man generally swears or should swear knowingly, deliberately, and truthfully. He may not, however, do this, and the oath may turn up to plague him. It is always and under all circumstances a fact tending to prove the issue against the affiant, but its precise insight is for the jury & depends on circumstances. Some courts hold that one who knowingly, wilfully, and wickedly swears to a fact knowing it to be untrue shall be precluded forever afterwards from denying the truth of that fact for his own advantage, and this upon grounds of public policy. If another acts on the false oath, and it would injure that other to permit its denial by the affiant,
117 , this principle is indisputable. But there is no such application of it here, because the plaintiff could not have made this contract on the faith of subsequent admissions; therefore it is open to explanation whether the sworn admissions were made intentionally, knowingly, or inadvertantly, or by mistake of defendants or their counsel, and in the light of all the proof you should consider the sworn admissions and weigh them and value them according as they were deliberately or inadvertently made. In respect of the alleged admissions of dealings as partners in making this contract contained in this memoranda of compromise negotiations, like the other you value them according as they were deliberately or inadvertently made.

But there is a special principle of law applicable to them you should consider. If you find that this question of partnership or corporation was made at the time of the compromise negotiations a subject of controversy and of compromise, such admissions are of no value.

The law does not permit admissions made to bring peace and end litigation to be used in evidence. But if other matters are in dispute and the only subject of compromise the admission of a fact disconnected with the subject of compromise [it] is admis-able
118 for what it is worth, unless you find it was so clearly connected with the dispute under compromise as to be a part of it. All admissions made merely to end litigation by compromise are of no value if they pertain to the subject then in dispute. It is for you to say if this particular admission was made by way of compromise. If so, exclude it. Except the general rules applicable in weighing all conflict of testimony the court has said all that it thinks may aid you in this branch of the controversy.

Contract of June 23rd, 1881.

If you find the issue of the partnership in favor of the plaintiff, the next consideration for you in the alleged breach of the contract and the first important inquiry is, What did the defendants contract to do? Their contract is in the writing of June 23rd, 1881, leaving out of view for the present the subsequent dealings of the parties, including the supplemental contract of March 30th, 1882, about

which there is so much controversy. That instrument of June 23rd, 1881, reads as follows:

"CINCINNATI, O., *June 23rd*, 1881.

"The American Pressed Tan Bark Co., of 240 Broadway, New York:

119 "GENTLEMEN: We hereby propose to furnish you the following machinery:

"1 14" x 24 engine & all necessary trimmings for grinding bark.

"2 14 x 48 engine & all necessary trimmings for propelling boat.

"3 boilers, 42 x 26 & all necessary trimmings.

"3 bark mills & all necessary trimmings & gearing.

"1 bark elevator; 2 elevators with platforms for raising and lowering pressed bark to & from hold of boat, to be provided with safety catches & unwinding device; 3 heaters for bark engines, 1 for boat engine, & 1 for steam pumps; 1 steam pump for boiler feeder; 1 deck hand-pump; 250 feet of 2" rubber hose, couplings, & 3 nozzles; 2 hoppers and scales to weigh bark; all the necessary shafting, hangers, pulleys, beltings, and all steam and escape pipes; also 1 20 hyd. press & 2 12 hyd. presses, with their necessary fixtures and connections, together with the necessary hydraulic steam pumps, tank, &c., for pressing bark into bales; all to be done in a workmanlike manner and of first-class material and set up aboard your boat in Cincinnati, Ohio, for the sum of twenty-three thousand seven hundred ($23,700.00) dollars, the above machinery to
120 have a sufficient capacity to do the required work & guaranteed to pass Government inspection.

"(Signed) THE McGOWAN PUMP CO.

"To be completed in 60 days."

We accept the above.
Accepted June 23rd, 1881.
(Signed) AMERICAN TAN BARK CO.,
By S. H. BEACH, *Att'y.*

I think the jury will agree, whether counsel do or not, that without the parol evidence admitted in this case we would have a very imperfect understanding of this document, and without stopping to further consider that question here the reserved exceptions to its admission *is* overruled. Ordinarily a court in construing a contract confines itself to the four corners of the instrument, but this document is of that indefinite character which requires that it should be construed in the light of the circumstances of the case. If there were any disputed fact important to its construction the court would submit that dispute to you and instruct you how the instrument should be construed when you had ascertained the fact. But there being no such disputed fact it is the duty of the court to con-
121 strue it and instruct you how you shall deal with it in deciding whether there has been any breach of the contract.

Confining ourselves for the present strictly to this instrument its language does not, when read in the light of the proof, in the

opinion of the court, restrict, as contended by defendants, their liability to a workmanlike construction of machinery made upon designs, plans, and specifications furnished by the plaintiff or agreed upon by the parties. It has a wide scope. The defendants undertook to furnish the designs, plans, and specifications for machinery that would "do the required work" and guaranteed that it would accomplish the results they specified in their contract, as interpreted by their letters of April 23rd, 1881, June 30th, 1881, July 5th, 1881, and the other proof in the case. They excluded in terms all guarantee that ground tan bark would bale or any weight or size of the bales, but in unmistaken terms they guaranteed that the press could be used up to 1,500 tons and the work done rapidly, specifying that the "motions" could be made in two and one-half minutes, and that it all should be done in a workmanlike manner and of a first-class material. This guarantee they are bound to make good unless something has occurred to relieve them of it. It may have been unwise in them to undertake so much—they may have made
122 a hard bargain beyond their skill or ability to perform—but we have nothing to do with that, and they having undertaken the contract must be held to its performance or damages for its breach unless relieved, as before mentioned. The law does not require physical or mechanical impossibilities, as, if a man contracts to build a railroad to the moon, the contract is not binding. If, therefore, you find that within the range of mechanical art or science it was impossible physically to construct a machine to deliver 1,500 tons hydraulic pressure to the bark in the containing cylinders then defendants would be liable for nothing more than to pay the money back, and that would be the sole measure of their recovery in this case.

But if you find that within the range of mechanical art such pressure could have been delivered to the bark it was their obligation to do it. The whole field of mechanical engineering was open to them, except so far as it was restricted by the necessity of placing the machine upon a floating foundation, to be furnished by the plaintiff, of which more hereafter will be given you in charge. They were not restricted in plans, specifications, or materials, and were bound to select such plans and materials as were available and capable of doing the work.

123 It was their misfortune if the price demanded was not sufficient to cover the cost, but that fact, if it be one, cannot relieve them. In short, they contracted as "mechanical engineers" and as manufacturers and are bound by the contract as they made it it this respect.

28.

Contract of March 30th, 1882.

Coming now to the contract of March 30th, 1882, and for the present purpose looking solely to its construction and interpreting its language in the light of the circumstances of the case, what legal effect has it had to modify or restrict the liability imposed by the construction just given to the contract of June 23rd, 1881? The

court thinks it has not changed the original contract in this respect, except to eliminate all guaranty of time required to press bark into bales and remove them from the cylinders, whereby the defendants have been released from an obligation that their machine will deliver the bales very rapidly or in 2½ minutes, and were only bound to a reasonable time in this regard. In all other respects it continues the former guarantee. But it is urged by plaintiff that this is not a valid and subsisting contract, because—

1st. It was procured by fraudulent misrepresentations by the defendants; and

124 2nd. Because it has been abandoned. The act of abandonment relied upon is that the defendant sued the plaintiff for unpaid balances, the price of the reconstruction work, and for the price of the extra work under the original contract, the release of which price for extra work constituted a part of the consideration of this contract of March 30th, passing the contention of the defendants that it was the suit of the corporation and not their suit. Wherefore, no abandonment can be predicated on it. The court charges you that if it were the suit of the defendants themselves no abandonment can be predicated on it. If a party pleads a fact and sets up a course of action and stands by his plea to final judgment he cannot change it. But his mere pleading of it does not bind him irrevocably to it, for he may dismiss his suit and set up another and even an inconsistent course of action and amend it at his pleasure. Suing, therefore, on one course of action cannot be held to be, certainly in a collateral way like this, an abandonment of another.

3d. The admission of a pleading may be used in evidence tending to show the truth of the fact stated as against the party in the way already pointed out as to the admission about the partnership.

But *hearing* out of view the defendants' claim of mistaken
125 information to counsel and consequent error of pleading altogether, and looking at the suit for the extras as if no such claim were made by defendants, *and* the pleading does not tend to show any agreement between the plaintiff and defendant for a re-cission or abandonment of the contract of March 30th.

The most it tends to show is that the defendants had a then present intention to repudiate the contract on their part, and not necessarily because the plaintiff had manifested its intention to repudiate, though that may have been the reason, but there was nothing to prevent the defendants from changing their minds & concluding to stand by and insist on the contract, as they subsequently did. Neither could repudiate his own obligation without the other's consent to release him, and it is a confusion of ideas to suppose that because both may be willing to repudiate, each for himself, there can be a re-cission or abandonment without a mutual release, either express or implied. Neither has done anything to release the other in this case. To illustrate this point, the court has no doubt whatever that here and now at this present moment, after all the struggle of the plaintiff to repudiate this contract of March 30th for fraud or other reason, no matter what, it could grant leave to plaintiff
126 to amend the petition in this case and set up and insist on

the contract of March 30th. If this be so the defendant- would have the same right in their suit notwithstanding all that is said about their signing the contract in that suit. The court, therefore, charges you that there was on the proof in this case no abandonment by defendants of the contract of March 30th, and it is binding on the plaintiff unless it was procured by fraudulent misrepresentation of the defendant. Upon this point the court charges you that, to enable the plaintiff successfully to object to the performance of the contract of March 30, 1882, it must establish to the satisfaction of the jury that said contract was procured by the fraud or misrepresentation of the defendants, or one of them. But if it appears to the jury from the testimony that Theodore J. McGowan, on March 27th, 1882, represented to the agents of the plaintiff that he was then pressing bark with a pressure of 800 or of 1,000 tons to the square inch, and even if it appears to the jury from the testimony that he was in fact knowingly pressing bark with a much less pressure, viz., with not more than 340 tons' pressure to the square inch, and that he made said statement falsely and with intent to deceive the plaintiff, yet if the plaintiff, before entering into said contract of
127 March 30th, 1882, knew or had reason to believe that said statement was false, and did not rely upon the same, and knew or had reason to believe that the real pressure was not in excess of 350 tons to the square inch, then the said contract of March 30th is not affected by said misrepresentation, and the plaintiff cannot refuse to perform it on that account.

To enable the plaintiff successfully to object to the performance of the contract of March 30th, 1882, on the ground that it was procured by a false representation made by the defendants, or one of them, it must appear to the jury from the testimony that the plaintiff trusted to said false representation, & relying upon it was induced thereby to enter into said contract. But if, on the contrary, it appear to the jury from the testimony that the plaintiff had an expert in its employ, and that said expert reported to the plaintiff before said contract of March 30th, 1882, was, in fact, entered into that the said representation was, in fact, false, & thereby the plaintiff was informed that it was false, and entered into such contract with such information and with reason to believe that the same was false, then the contract of March 30, 1882, is binding upon the parties, notwithstanding such false representation; that the plaintiff cannot
128 avoid its obligation to perform the contract of *of* March 30th, 1882, on the ground that Theodore J. McGowan falsely asserted on March 27, 1882, that he was pressing bark with a pressure of 800 tons or of 1,000 tons if, before the contract was, in fact, made, its agents, Beach and Hill, or one of them, had been informed by Kemplin, an expert in the plaintiff's employment, that the actual pressure was less than 350 tons, and if they, therefore, did not rely upon such statement of McGowan, the court therefore directs that under these instructions you consider whether or not the contract of March 30th was procured by the fraudulent representations of defendants on which plaintiff relied for their truth; if so the instrument is void and is of no effect in this case; if not you will con-

sider it as valid so far as it affects this suit, which is the extent of modifying the original guaranty of defendants in the manner already indicated by eliminating the obligation to deliver a bale in 2½ minutes and substituting a reasonable time, which you will determine according to the objects and uses intended.

The court has been troubled here to determine whether the plaintiff should not have sued on the contract of March 30th as a new contract substituted for the old contract by a kind of novation, as counsel called it, if it be found a substituting contract not
129 void for the alleged fraud of misrepresentation, but has concluded that, although the plaintiff's petition entirely ignores this contract being pleaded in defence by the defendants, the plaintiff may have all benefit of it as if it had set it up in its petition if the contract be established against the plaintiff in defendants' plea, both documents being really one contract in legal effect so far as it affects the breach sued for in this suit.

But it is insisted this contract of March 30th is not binding and can have no effect in this suit, because defendants have not performed their part of the consideration, namely, the delivery of the vouchers or receipts mentioned, the transfer of the patterns, the interest in the patents for the accumulation, and the double end that as to the latter there is no patent and can be no performance. The defendant insists, on the other hand, that the balance of the money has not been paid by plaintiff, and it cannot complain of non-performance, and there is proof tending to show defendants have still pending an application for this patent.

The court regards all this subject as immaterial to this controversy, and charges you that the obligation to perform these things by the defendants does not arise until the money is tendered
130 or paid, and no breach could be averred until that has been done.

But the plaintiff has not sued on that contract nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine, and nothing else. This contract is pleaded by defendants as a defence to a claim of breach, and so setting it up the only question is whether it constitutes a defence. It is only a supplemental contract to that of June 23rd. It continues the guarantees of that contract with the exception as to time. It does not make new guarantees for a new consideration, but obligates the defendants to carry out the old contract with the named exception, and imposes on defendants new obligations about the patterns, etc., which are independent and separable from the old contract and the old consideration. The court, therefore, charges you that its only effect is to reduce the original guaranty for the capacity of the machine in respect to the time for pressing the bale, if you find there was no fraud in procuring it; if there was such fraud it leaves that guaranty still in force. But you must understand that the failure, if any, of the defendants to deliver the vouchers, patterns, etc., does not at all contribute to any alleged breach of the guaranty
131 for the capacity and quality of the machine, and such failure

does not entitle plaintiffs to recover for anything sued for in this suit.

The question of breach of the guaranty sued for must depend on the other proof in the case relating to alleged defects in the machine.

The next question arising upon the construction of the contract has already been substantially disposed of, but requires a special mention to avoid misunderstanding. The defendants claim that its proper construction requires that 1,500 tons only applies to strength of material to endure that pressure as a maximum of endurance, not for a continuous working pressure.

It belonged to the plaintiff to say what it wanted and to defendants to consider it when they made the contract, whether they could give that which was wanted. There is no proof tending to show that the proper construction is that the plaintiff only wanted a machine of sufficient strength to endure a test of 1,500 tons, but, on the contrary, read in the light of the circumstances proved, the language of the contract clearly means that the plaintiff wanted a machine by which they could deliver on each and every bale a compression of 1,500 tons, if they chose so to use it, and which
132 would endure the work for the length of time such a machine would wear under prudent and reasonable management by the plaintiff.

This disposes of the construction of the contract and all that relates to its validity and binding force between the parties.

Excuses for Alleged Breach.

Having construed the contract, the next question in logical order would be an inquiry whether the alleged breach has taken place, but for convenience the court will first dispose of defenses offered as an excuse for the alleged breach, except they are relied on to excuse the delay in time, which will be considered in connection with the subject of damages.

The fact that the plaintiff accepted the machine and on April 19th, 1882, employed the defendants to do certain work in its reconstruction, under the supervision of a mechanical engineer, the witness Kemplin, does not afford any excuse. That was an independent contract that has nothing to do with this case in this connection.

That the contract of April 19th, 1882, is valid and binding between the parties thereto, and that it bound and obliged the
133 plaintiff to pay for the work therein specified at the prices therein named, and that the plaintiff cannot recover in this case for any part of the said cost or expense of such work.

The next excuse arises out of the alleged defects in the boat to be furnished by the plaintiff to receive the machinery and built under the Mack contract. Now, it is plain the defendants' guaranty, so far as it relates to strength of material used and the capacity and mechanical appliances selected for the machinery they were to construct, is not affected by the boat, except so far as the design of the

boat may have limited their freedom of selection of plans for their mechanism.

But it is an indisputable fact that before they made their contract they knew of the design for the boat and fully of all its plans and specifications, as shown in the Mack contract, and, if the plaintiff's proof is believed by you, they were instrumental in determining upon the plans and specifications of the boat. But whether this is so or not they certainly knew fully all about the Mack contract and what it required, and planned their machine in full knowledge of what that boat would be if Mack complied with the con-
134 tract. Therefore they cannot complain of any mere defect in design of the boat of a restriction in their freedom of selection of plans for the machine they were to furnish. But this knowledge, nor any part they took in advising about the boat, nor its supervision of construction, if you find they agreed to any supervision, could not and did not bind them to any guaranty that the boat should be constructed in accordance with and up to the requirements of the contract with Mack. They were not guarantors of Mack's work, and Mack was the plaintiff's agent, not theirs. The plaintiff was bound to furnish a boat fully up to the Mack contract in its specifications, so far as the boat was needed as a mechanical foundation for the proper working of the machine. It is for you to determine this on the proof. If the boat bore no more relation to the machine than that of carrier, and was not essential to it further than to bear it up—no more intimate mechanical relation than the case of a watch to its machinery, to use an illustration from the proof—the defendants would not be excused for any defects in the boat which did not contribute to defective working of the machine. So far as the machine failed on that account, the defendants would not be liable, but would be liable for any other defects in the
135 machine. If, however, on the proof you find that the boat had a more intimate relation than a mere bearing foundation, and was so identified with the machine as to be an essential part of its mechanical foundation, I charge you that the defendants would be excused from any defects dependent on the insufficiency of that particular part of the mechanical foundation until the plaintiffs had made it good, after which the machine should work properly and the defendants would be liable for any further failure in the mechanism.

The machinery being contracted to be set up on the plaintiff's boat it is for the jury to determine what the boat was that was referred to, and if the boat intended was one provided to be constructed by one James Mack, of a kind, and of dimensions, and with bulkheads or foundations, then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulkheads so defined and understood by the parties for rendering the machinery stable to do the required work when set up aboard the boat.
136 You will therefore consider how far the boat was necessary to the existence of or the efficient working of the machine, and

for such damage as resulted from that defect, wholly or in part, the defendants are not liable, but for all other damage not contributed to by ascertained defects in the boat they are as liable as if no such defect in the boat existed.

Alleged Breach of Contract.

We now come to the alleged breach of the contract. That question of fact the court proposes to leave to you without any comment on the evidence whatever. It is for you to say whether the work of the defendant conformed to the contract, as the court has explained it to you, and how far it fell short of it; whether the hydraulic machinery would "do the required work," as that term has been explained, and whether all the other machinery, including the propeling engines, there for delivering the power to the bark-mills, conveyers, &c., were what was contracted for and all done in a workmanlike manner. If not, the defendants are liable for all damages which has resulted from the breach of contract you may find to have been committed by a failure to construct the machinery ac-
137 cording to the contract. The court cautions you that defendants were not liable for the best plans or designs or machinery, but only for sufficient plans, designs, and machinery to do the work constructed in a workmanlike manner. If the machine they furnished was constructed in a workmanlike manner and sufficient in first-class material, capacity, plan, and construction to do the required work, they are not liable; if otherwise, they are. The court leaves that question with you.

The Measure of Damages. Effect of the Delay.

In instructing you as to the measure of damages the court will first consider those claimed by the plaintiff as the result of the delay in finishing this machine. The contract bound the defendants to complete the machinery and set it up on the boat within 60 days. It is too plain for argument that the failure of plaintiff to have boat ready would excuse the defendants from strict compliance with this part of the contract, and that all delay which occurred before the boat was ready is out of the case.

The plaintiff was as much responsible for that as the de-
138 fendants, or sufficiently so to preclude him from complaint on that score.

The following is the law on that subject, in the opinion of the court:

If the jury find the contract was made, as alleged, with the defendants, and that after the day named for the completion of the contract, the work not being then completed, that the boat was not then in readiness to receive it, yet, if the boat was thereafter made ready by Mr. Mack, and the defendants provided under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement and such additional time as may have been lost in the prosecution of the work occasioned by Mack's delay in the construction of the boat, and,

failing in this, they are liable for the consequence of such failure and delay.

Therefore the court charges you that the defendants are only liable for any damage caused by delay for the period of delay found by application of the above rule to be proof in this case.

The court has no doubt that the defendants are liable for all losses resulting directly from the delay which were in the contemplation of the parties to be saved by the stipulation as to time. Hence, if the tan bark purchased on the Tennessee river at a cost of
139 nearly $15,000.00 should be found by the jury to have been purchased, as alleged by the plaintiff, in pursuance of a direct understanding with the defendants that it might be collected, as it was, for grinding and pressing, in reliance upon the stipulation as to time they would be liable for any loss resulting from the delay, as, for example, if it had rotted on the bank or become unfit for grinding before the machine was ready under the above rule. But its loss by flood is not the result of that delay, but of the flood which carried it away. It is possible, perhaps probable, that if the machine had been finished in time the bark would have been ground and saved, but not certain, because the plaintiff may have made some other disposition of it or been prevented by some other cause. It does not therefore appear, and cannot on the facts of this case be said to be proved, that its loss is the certain or direct result of the delay. The court therefore charges you if the tan bark, the loss of which is now complained of, was in fact lost by floods in the Tennessee river the plaintiff cannot recover the value of such tan bark, or any damages for its loss, in this case, even though it may appear that the tan bark would not have been lost if the defendants
140 had performed their contract to build the machinery described in the contract of June 23rd, 1881. So as to the alleged loss of profits the court is clear that the proof cannot be considered. It is altogether speculative.

There was none and is yet no established market for the plaintiff's product, and it has not established a business the profits of which can be ascertained. The alleged profits that would have been made on the Tennessee river bark go with the bark itself beneath the flood and cannot be considered.

So too much reference — to the rental value, so to speak, of the boat and machinery, or the value for its use. It is not like ordinary boats with charter values or established value for use as carriers. There was never any craft or machine like this, and all the proof as to its rental value or the value of its use for the time of the delay is speculative and cannot be considered.

This substantially eliminates all proof of damage by delay, except the expenses of the plaintiff in caring for the boat during the delay. It may recover if there be any proof of such expenses as were incurred because of the delay, and which would not have been incurred but for the delay. But where the expense would have
141 been necessary if there had been no delay they cannot be recovered on account of it.

This instruction applies solely to expenses of care or keep and not to expenses made on supplies, betterments, etc.

So the expenses of saving the bark are not the result of the delay. That goes with the floods.

Nor can the expenses of reconstruction be recovered as damages. How far that expenditure may influence your verdict as to damages will be mentioned directly, but they cannot be recovered as a measure of damages.

The True Measure of Damages.

The rule for measuring the plaintiff's damages is to find the difference between the money value of the machinery contracted for, if it had been constructed in all respects according to the contract as it has been construed for you by the court, and the money value of the machinery as it was actually constructed and delivered to the plaintiff, to which may be added the items of expense for keep of the boat during the delay caused solely by the delay.

In reaching the verdict on this basis you may look to all the proof. Damages are never the subject of exact calculation in cases like this, and you can only make up a verdict from the
142 proof as best you may, having care not to give damages on mere conjecture, but on the proofs. You have the opinions of witnesses as to values to which you may look, not for the purpose — taking that as a measure of the damages, but only as a fact throwing some light on the value of the machinery as contracted for by the parties, as you may look to the cost of the reconstruction, not as a measure of the damages, but solely as a fact throwing light on the question of value, having care not to look at any expense for a reconstruction incurred to make a better machine than defendants' contract called for nor to look at any unnecessary expense. But all expenses necessary to bring the machinery up to the standard of the contract are proof of value or difference in values to which you may look. So you may look at all the proof which throws any light on the difference in value between the machinery as it was and as it ought to have been. This applies to all the machinery to be furnished by defendants as well as the hydraulic machine.

I will now read the following requests made by plaintiff's counsel:

If the jury find from the evidence that defendants, prior to the making of the contract of June 23rd, 1881, held themselves
143 out to plaintiff as partners, and that plaintiff dealt with them as such prior to the making of the contract of June 23d, 1881, *held themselves out to plaintiffs as partners, and that plaintiffs dealt with them as such prior to the making of said contract*, and entered into said contract believing them to be a firm, and without notice of a corporation, then said defendants are liable on said contract, even though they should find that defendants were not in fact a firm, and that there was a corporation called "The McGowan Pump Co."

If the jury find from the evidence that the defendants were, prior to June 23d, 1881, doing business as partners under the

name of "The McGowan Pump Co." or "McGowan Pump Co.," and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability thereon, even if on that date a corporation existed called "The McGowan Pump Company," with which defendants may have been connected, and to which they had turned over their entire partnership business and assets. The jury are instructed, if they find for plaintiff, that they are not to make any deduction from the amount of damages which plaintiff is
144 entitled to recover on account of any balance claimed to be due and unpaid on account of the contract price for said machinery or on account of any other contract; but they must return a verdict for plaintiff, if they so find, in such sum as will make plaintiff whole and compensate it for all losses and damages suffered by it as the direct result of defendants' breach of contract, and are not to make any deductions from said amount on account of any contract whatever.

The written contract, if the jury find it was made between the plaintiff and the defendants, requires the machinery to be made under it to be constructed in a workmanlike manner, of first-class materials, and to be set up aboard of the plaintiff's boat in Cincinnati, Ohio.

The machinery is to have sufficient capacity to do the required work, and is guaranteed by the McGowan Pump Co. The contract having thus defined the character of the work, it cannot in that respect be varied by parol evidence, which is admissable only to enable us properly to interpret the contract. It required the machinery to be constructed in a workmanlike manner and of first-class materials.

If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April
145 23rd and July 5th, 1883, then, while the McGowan Pump Co. did not guarantee that bark would bale, it did guarantee to furnish a practical machinery set up on board of the boat that was capable in its design and in all its parts of being worked to apply 1,500 tons pressure to press a bale of bark every two and one-half minutes, or within a reasonable time, if the contract of March 30th be valid and capable, with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such mechanism contracted for similar uses.

In respect to the alleged contract of March 30th, 1882, if the jury find that this contract was made by the plaintiff upon the faith of and induced by representations made by the defendants that the machinery had been worked under a pressure of 1,000 or 800 tons, and such representations were not true in fact, then that contract is not obligatory upon the plaintiffs.

If the jury find that the contract of March 30th, 1882, was duly made and is binding between the parties, it in no wise affects the right of the plaintiff to recover for any breach of the original agree-

ment between the parties, *it in no wise affects the right of the plaintiff to recover for any breach of the original agreement between the*
146 *parties* upon which this action is founded, or of the guarantees contained in such original agreement except for the failure in respect to the time required to press bark with the machinery into bales and to remove them from the cylinder. All the other obligations and guarantees of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30th, 1882.

I will now read requests made by defendants' counsel:

The fact that the McGowan Pump Company, suing as a corporation, filed the original petition in case No. 3277 in this court against the American Pressed Tan Bark Company, and that Theodore J. McGowan, as president of the pump company aforesaid, swore to said petition, does not amount in law or in fact to a rescission of the contract of March 30th, 1882.

The fact that the McGowan Pump Company, suing as a corporation, filed the original petition in case No. 3277 in this court against the American Pressed Tan Bark Co., and that Theodore J. McGowan, as president of the pump company, swore to said petition, does
147 not estop or in law prevent the defendants, or either of them, from asserting and maintaining in the present action that the contract of March 30th, 1882, is valid and binding between the parties thereto.

That the contract between the plaintiff & Mack required Mack to furnish the plaintiff a boat with all such timbers as were required for the support of the machinery, boilers, and engines, and put it in place in the hull and upon the decks, and in such form as may be necessary for the support of the machinery, and the plaintiffs are bound to furnish such boat in fit condition to receive the machinery before the defendants could be put in default for any delay [in] not placing the machinery thereon.

That by entering into the contract with James Mack to furnish the necessary foundations for the machinery, of which contract the defendants had notice, the plaintiff undertook and agreed to furnish such foundations and to look to Mack therefor, and that there was no obligation upon the defendants to set up any machinery on said boat until such foundations were in fact furnished, and were such as required by said contract with Mack, and cannot be considered in default until such boat was furnished.

148 That if before the 23rd day of June, 1881, the McGowan Pump Company had become incorporated and organized under the laws of Ohio, with Theodore McGowan as president and Robert C. Bliss as secretary, and if, when the contract of that date was made, the plaintiff was informed by the defendants that the McGowan Pump Company, which entered into said contract, was a corporation, then the plaintiff cannot recover against the present defendants.

That the contract of March 30th, 1882, required the plaintiff to pay to the defendants the sum of seven thousand two hundred dollars, and the defendants to transfer to the plaintiff all special pat-

terns made for their hydraulic machinery, and also their exclusive interest in the accumulation and double-end arrangement on hydraulic press- for bark purposes only.

That these were to be paid & performed at the same time by each party to the other.

And that readiness & willingness to perform on its part must be shown by either of the parties in order to entitled it to complain of the non-performance by the other.

And that the contract of March 30, 1882, is therefore binding and obligatory, notwithstanding it may appear to the jury from the testimony that the defendants failed to transfer said patterns, or
149–150 their interest in the accumulator and double-end arrangement, unless it also appear to the jury that the plaintiff was at the same time ready and willing to pay said sum of seven thousand two hundred dollars and notified the defendants thereof.

That the plaintiff having set up the contract of March 30th, 1882, was void, because the same was procured by fraud of the defendant, the burden is upon them to satisfy the jury that the said contract was brought about by fraud, and unless the plaintiff has established by preponderance of proof that it was so procured the jury must treat it as binding upon the parties.

That the jury cannot find damages upon conjecture without sufficient and satisfactory proof thereof, and if the plaintiffs have not given the jury satisfactory proof of such damages then the jury will not give them.

Unless the contract of March 30th, 1882, be set aside by the jury for the alleged fraud, then the plaintiff cannot recover for any damages resulting from delays in the construction of the machinery, except the expense of keeping the boat.

In determining the question of the facts that have been submitted to you it is necessary that I should give you in charge
151 certain rules of law by which juries are governed in the process of weighing and valuing evidence given before them. There are, without calling your special attention to them in this case, several points in conflict in testimony between the parties. It is your duty, wherever that conflict appears, first to reconcile, if you can, the testimony of both parties. If you find a theory based upon the proof by which it can be so reconciled it is likely to be the fact, and the conflict may be decided, and it is your duty to reconcile it in that way. If, however, you find it necessary to weigh and test the testimony in order to determine the conflict, the first thing to look at is the intelligence of the witness, whether of intelligence or not, and if he gives his testimony intelligently. Next you will look at the suit in itself. It used to be held that a man interested in a suit would not tell the truth, and consequently he was not allowed to testify, but we have got away from that now, and it is allowed to parties interested in the case to come forward and testify and tell you what they know about the controversy, but the fact remains — their interest is an important element to which you must look in weighing and testing the effect of that testimony.

152 Next, you must look to the relation of the witness to the parties—if he entertained relations of consanguinity or kinship, or relations of a social or business kind, or any relations tending to make him more to one party than to the other—you should consider that fact in testing his evidence. Next, whether he is biassed —a friendly or hostile witness. If you find him so, then you should charge him with the extent of his friendliness or hostility. You look whether he is a zealous or reluctant witness, candid or prevaricating, then you look to his means of information, then as to how he was situated at the time about which he testifies and how he is likely to know the fact about which he did testify, and see if he is competent to testify. Next look at his story and see if it is consistent. You naturally in this case give him more credit. Next if his testimony is more consistent than that of other witnesses. If it is there is a more valuable rule than all of these. In every case, no matter how complicated, there are always some undoubted facts that the jury know to be true, and there are in most cases a great many of such facts, and, knowing such facts to be true, if you would test the witness by a knowledge of the facts that are true, and
153 find out if they are consistent or inconsistent, you will find it is a very valuable rule and one which will suggest itself to your own intelligence, and which you will have no difficulty in applying, as you apply it in all your daily affairs.

Some courts rule that where a witness testifies falsely in the court of justice you may reject his testimony, and in case he has sworn falsely on one point you will not believe him on any other point where it stands unsupported. There is no rule which requires you to reject it, but it rests with you, looking to the fact that he has testified falsely in one case, whether his evidence is trustworthy on this other.

Those are the most prominent rules for your use in weighing & testing his testimony, but it is important you should fix where the burden of proof lies. It is the duty of the plaintiff to prove all the averments upon which he seeks to recover, and it is the duty of the defendant to prove all his averments in regard to new facts, &c., &c. It does not always belong to one side or the other, but in the exigencies of the case it may be shifted from one side to the other. In the question of whether or not McGowan & Bliss told Beach, We are a direct corporation, where does the burden of proof lie?
154 I think upon the defendant.

Under the charges the court has already given you it is the duty of defendant to prove to your satisfaction that he told Beach at the time the contract was signed that they were a corporation.

Without going over the whole testimony I will say generally the plaintiff must prove whatever facts are necessary to sustain his case; defendant must do what is necessary to prove any new facts which he may set up in his case.

I now leave the charges with you, unless counsel on either side have something to say:

The following charges, given at the request of the defendants, are here inserted by request of plaintiff:

2. "If before the 23d day of June, 1881, the McGowan Pump Company had become incorporated and organized under the laws of Ohio, with Theodore McGowan as president and Robert C. Bliss as secretary, and if when the contract of that date was made the plaintiff was informed by the defendants that the McGowan Pump Company, which entered into said contract, was a corporation, then the plaintiff cannot recover against the present defendants."

155 6. "To entitle the plaintiff successfully to object to the performance of the contract of March 30, 1882, it must establish to the satisfaction of the jury that said contract was procured by the fraud or misrepresentation of the defendants or one of them."

7. "But if it appear to the jury from the testimony that Theodore McGowan, March 27th, 1882, represented to the agents of the plaintiff that he was then pressing bark with a pressure of 800 or of 1,000 tons to the square inch, and even if it appear to the jury from the testimony that he was in fact and knowingly pressing bark with a much less pressure, viz., with not more than 340 tons pressure to the square inch, and that he made said statement falsely and with intent to deceive the plaintiff, yet if the plaintiff, before entering into said contract of March 30th, 1882, knew or had reason to believe that said statement was false and did not rely upon the same, and knew or had reason to believe that the real pressure was not in excess of 350 tons to the square inch, then the said contract of March 30th is not affected by said misrepresentation and the plaintiff cannot refuse to perform it on that account."

156 8. "To enable the plaintiff successfully to object to the performance of the contract of March 30th, 1882, on the ground that it was procured by a false representation made by the defendants, or one of them, it must appear to the jury from the testimony that the plaintiff trusted to said false representations, and, relying upon it, was induced thereby to enter into said contract; but if, on the contrary, it appear to the jury from the testimony that the plaintiff had an expert in its employ, and that said expert reported to the plaintiff before said contract of March 30th, 1882, was in fact entered into, that the said representation was in fact false, and thereby the plaintiff was informed that it was false, and entered into such contract with such information, and with reason to believe that the same was false, the then contract of March 30th, 1882, is binding upon the parties, notwithstanding such false representation."

9. "That the plaintiff cannot avoid its obligation to perform the contract of March 30th, 1882, on the ground that Theodore McGowan false- asserted, on March 27th, 1882, that he was pressing bark with a pressure of 800 tons or of 1,000 tons, if, before the contract was in fact made, its agents, Beach and Hill, or one of them,

157 had been informed by Kemplin, an expert in the plaintiff's employment, that the actual pressure was less than 350 tons, and if they, therefore, did not rely upon such statement of McGowan."

13. "That the contract of March 30th, 1882, required the plaintiff to pay to the defendants the sum of seven thousand two hundred dollars, and the defendants to transfer to the plaintiff all spe-

cial patterns made for their hydraulic machinery, and also their exclusive interest in the accumulator and double-end arrangement on hydraulic press for bark purposes only; that these were to be paid and performed at the time by each party to the other; and that readiness and willingness to perform on its part must be shown by either of the parties in order to entitle it to complain of the non-performance by the other; and that the contract of March 30th, 1882, is, therefore, binding and obligatory, notwithstanding it may appear to the jury from the testimony that the defendants failed to transfer said patent or their interest in the accumulator and double-end arrangement, unless it also appear to the jury that the plaintiff was at the same time ready and willing to pay said sum of seven thousand two hundred dollars, and notified the defendants thereof."

14. "That by the contract of March 30, 1882, the parties
158 waived and withdrew all previous agreements and guarantees relating to the hydraulic machinery, except only that the material of which it was composed had sufficient strength to work up to a total pressure of 1,500 tons, and that the defendants are not liable to damages in this action for any defect in said hydraulic machinery if said material had sufficient strength to work up to such pressure unless under the charge of the court the jury believe from the testimony that the said contract was procured by fraud or false representation, and is, therefore, not binding upon the plaintiff.

15. "That the contract of April 19th, 1882, is valid and binding between the parties thereto, and that it bound and obliged the plaintiff to pay for the work therein specified at the prices therein named, and that the plaintiff cannot recover in this case for any part of the said cost or expense of such work.

17. "If the tan bark, the loss of which is now complained of, was, in fact, lost by floods in the Tennessee river the plaintiff cannot recover the value of such tan bark or any damages for its loss in this case even though it may appear that the tan bark would not have been lost if the defendants had performed their contract to
159 build the machinery described in the contract of June 23, 1881."

25. "That the contract between the plaintiff and Mack required Mack to furnish the plaintiff a boat with all such timbers as were required for the support of the machinery, boilers, and engines, and put in place in the hull and upon the decks and in such form as may be necessary for the support of the machinery, and the plaintiff was bound to furnish such boat in fit condition to receive the machinery before the defendants could be put in default for any delay — not placing the machinery therein."

26. "That by entering into the contract with James Mack to furnish the necessary foundations for the machinery, of which contract the defendants had notice, the plaintiff undertook and agreed to furnish such foundations and to look to Mack therefor, and that there was no obligation upon the defendants to set up any machinery on said boat until such foundations were in fact furnished, and were such as required by said contract with Mack, and cannot be considered in default until such boat was furnished."

29. "That the plaintiff having set up that the contract of March 30th, 1882, was void because the same was procured by fraud
160 of the defendants the burden is upon them to satisfy the jury that the said contract was brought about by fraud, and unless the plaintiff has established by preponderance of proof that it was so procured the jury must treat it as binding upon the parties."

30. "That the jury cannot find damages upon conjectures without sufficient and satisfactory proof thereof, and if the plaintiff has not given the jury satisfactory proof of such damages, then the jury will not give them."

In testimony whereof I, the judge of said court trying the said cause, have, on this 29th day of September, and at the term of the said trial, set my hand and seal and ordered the same to be made a part of the record.

E. S. HAMMOND, [SEAL.]
Judge, &c.

161 And afterwards, to wit, on the 6th day of October, A. D. 1883, came the defendants and filed in the clerk's office of the court aforesaid their certain supersedeas bond in this cause, which said bond is in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio.

THE AMERICAN PRESSED TAN BARK COMPANY
vs. } 3260.
THEODORE J. MCGOWAN *et al.*

Know all men by these presents that we, Theodore J. McGowan and Robert C. Bliss, partners under the firm name of The McGowan Pump Company, as principal, and Louis L. Hommedien and Howard Ferris, are held and firmly bound unto The American Pressed Tan Bark Company in the sum of twenty-five thousand dollars, to be paid to the said The American Pressed Tan Bark Company; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

162 Sealed with our seals. Dated this fifth day of October, 1883.

Whereas the above-named Theodore J. McGowan and Robert C. Bliss, partners as aforesaid, *has* taken a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Theodore J. McGowan *et al.* shall prosecute their said writ of error to effect and answer all damages and costs if they shall

fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

THEODORE J. McGOWAN. [SEAL.]
ROBERT C. BLISS. [SEAL.]
LOUIS L. HOMMEDIEN. [SEAL.]
HOWARD FERRIS. [SEAL.]

Sealed and delivered in presence of—
THOMAS CORWIN.
ROB'T C. GEORGI.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. Ohio.

SOUTHERN DISTRICT OF OHIO, *ss:*

163 I, Louis L. Hommedien, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth twenty-five thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

LOUIS L. HOMMEDIEN.

Sworn to before me the 5th day of October, 1883.
[SEAL.] ROBERT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Howard Ferris, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name, situate in the city of Hamilton, in said district.

HOWARD FERRIS.

Sworn to before me the sixth day of October, 1883.
[SEAL.] ROBERT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

And afterwards, to wit, on the 6th day of October, A. D. 1883, came the defendants, by their attorneys, and filed in the clerk's office of the court aforesaid a certain assignment of errors in this cause, which said assignment of errors is in the words and
164 figures following, to wit:

Assignments of Error.

United States Circuit Court for the Southern District of Ohio.

THE AMERICAN PRESSED TAN BARK COMPANY, a Corporation Created under the Laws of the State of New Jersey,
vs.
THEODORE J. McGOWAN and ROBERT C. BLISS, Partners under the Firm Name of The McGowan Pump Company. } 3260.

1882, July 6.—Petition filed.
1883, July 11.—Judgment for $18,000.00, with interest and costs.

The court trying this cause, having allowed a writ of error to the Supreme Court of the United States, the counsel for the defendants does now assign the following as error in the proceeding and judgment of the court:

First. The court erred in proceeding with the trial of this cause, under and upon the contract of June 23d, and upon the peti-
165 tion in the case.

Second. The court erred in refusing to receive evidence offered by the defendants below and plaintiffs in error.

Third. That the court received incompetent evidence against the objection of the defendant and plaintiffs in error.

Fourth. That the court erred in overruling charges asked by the defendants, plaintiffs in error.

Fifth. That the court gave special charges asked by the plaintiffs, to which exceptions were taken by defendants below.

Sixth. That the court erred in the general charge in parts objected to at the time by defendants below.

Seventh. That the court erred in overruling the motions for a new trial.

Eighth. That the court erred in not granting the motion in arrest of judgment.

Ninth. That the court erred in rendering judgment for the plaintiff.

166 Tenth. That there are other errors apparent upon the record to the prejudice of the plaintiffs in error, defendants below.

And said Theodore J. McGowan and Robert C. Bliss pray that the judgment against them may be reversed and that they recover their costs thereon.

HOADLY, JOHNSON & COLSTON,
LINCOLN & STEPHENS,
Attorneys for Pl'ffs in Error.

167 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before

you, between The American Pressed Tan Bark Company and Theodore J. McGowan *et al.*, a manifest error hath happened, to the great damage of the said Theodore J. McGowan *et al.*, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixth day of October, 1883, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

WM. C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, southern district of Ohio. No. 3260. The American Pressed Tan Bark Company [*vs.*] Theodore J. McGowan *et al.* Writ of error.

168 THE UNITED STATES OF AMERICA, *ss:*

To The American Pressed Tan Bark Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Theodore J. McGowan *et al.* are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-three.

GEORGE R. SAGE,
District Judge, S. D. O., Sitting and Holding the Circuit Court for said District, no Circuit Judge or Circuit Justice being present.

168½ [Endorsed:] United States circuit court, southern district of Ohio. No. 3260. The American Pressed Tan Bark Company *vs.* Theo. J. McGowan *et al.* Citation to defendant in error.

October 8th, 1883.—Service accepted.

McDOUGALL & LONGWORTH, &
STALLO & KITTREDGE,
Att'ys for American Pressed Tan Bark Co., Def'ts in Error.

Service	2 00
Copy	50
1 mile	06
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169 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, William C. Howard, clerk of the circuit court of the United States for the southern district of Ohio, do hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the American Pressed Tan Bark Company, &c., is plaintiff, and Theodore J. McGowan *et al.* are defendants, as the same remain on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati this 10th day of October, A. D. 1883, and in the 108th year of the Independence of the United States of America.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

Attest: WM. C. HOWARD,
Clerk U. S. Circuit Court, S. D. Ohio.

Endorsed on cover: S. Ohio C. C. U. S. No. 168. Theodore J. McGowan and Robert C. Bliss, partners under the firm name of The McGowan Pump Company, plaintiffs in error, *vs.* The American Pressed Tan Bark Company. Filed 13th October, 1883.

121-57

Robert Clarke & Co., Printers, Cincinnati.] *[January, 1887.*

IN THE

Supreme Court of the United States.

Theodore J. McGowan and Robert C. Bliss, Partners under the firm name of The McGowan Pump Company,

Plaintiffs in Error,

vs.

The American Pressed Tan Bark Company,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFFS IN ERROR.

By HOADLY, JOHNSON & COLSTON,

their Attorneys.

Robert Clarke & Co., Printers, Cincinnati.] *[December, 1886.*

IN THE

Supreme Court of the United States.

Theodore J. McGowan and Robert C. Bliss, Partners under the firm name of The McGowan Pump Company,

Plaintiffs in Error,

vs.

The American Pressed Tan Bark Company,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern Dictrict of Ohio.

BRIEF FOR PLAINTIFFS IN ERROR.

By HOADLY, JOHNSON & COLSTON,

their Attorneys.

STATEMENT OF THE CASE.

This is a writ of error to reverse a judgment rendered at the April term, 1883, of the Circuit Court of the United States for the Sixth Judicial Circuit, and Western Division of the Southern District of Ohio, in a case, tried before Hon. E. S. Hammond, Judge of the District Court for the Western District of Tennessee, holding by appointment the Circuit Court of the United States for the South-

ern District of Ohio, and a jury, brought by the American Pressed Tan Bark Company against the plaintiffs in error. The jury, (Record, 23,) found the issues joined for the plaintiff, and assessed its damages at eighteen thousand dollars. The plaintiffs in error, (defendants below,) moved for a new trial and to arrest the judgment, and also to restrain execution to the amount which should remain after deducting the amount sued for in the case of *The McGowan Pump Company* v. *The American Pressed Tan Bark Company*, in the same court. The motions for new trial and in arrest of judgment were overruled, and judgment rendered upon the verdict. And thereupon a bill of exceptions was taken at the same term, and is embodied in the record, setting out all the exceptions taken by the plaintiffs in error to the action of the court, (Record, 25–72,). The petition, filed July 6, 1882, (Record, 1 to 4,) states, that the plaintiff, The American Pressed Tan Bark Company, entered into a contract, with one James Mack, for the construction of a steamboat, for the purpose of receiving, carrying and operating the machinery thereafter named in the petition, and which steamboat was to be built under the control and supervision and to the acceptance of the defendants, McGowan & Bliss; that said boat was constructed by Mack for the plaintiff, under the supervision and control of the defendants, and was accepted by the defendants; that the contract for its construction was made with Mack, with the full knowledge on the part of the defendants, for the purpose for which it was being built, and with the direction, counsel and advice of the defendants; that the boat and necessary equipments has cost plaintiff, including insurance and expenses, a sum in excess of fourteen thousand dollars; that on the 23d day of June, 1881, the defendants entered into a contract with

plaintiff, in consideration of the payment to be made, by plaintiff to defendants, on the completion of said contract, of the sum of $23,700, whereby defendants agreed and guaranteed to construct, erect, complete and have in operation on board of said boat within sixty days from the 23d day of June, 1881, for the purpose of pressing tan bark under a patent process belonging to the plaintiff, and according to plans, specifications and details furnished by ~~plaintiff~~ defendants:

"One 14" x 24" engine and all necessary trimming for grinding bark.

Two 14" x 48" engines and all necessary trimmings for propelling boat.

Three boilers 42" x 26", with all necessary trimmings.

Three bark mills, with all necessary trimmings and gearings.

One bark elevator; two elevators with platforms for raising and lowering pressed bark to and from the hold of the boat, to be provided with safety catches and unwinding service; three heaters, one for bark engine, one for boat engines, and one for steam pumps; one steam pump for boiler feed; one deck hand-pump; two hundred and fifty feet of hose; two-inch rubber hose, couplings, and three nozzles; two hoppers and scales to weigh bark; all the necessary shafting, hangers, pulleys, belting, and all steam and escape pipes.

Also one twenty-inch hydraulic press and two twelve-inch hydraulic presses, with their necessary fixtures and connections, together with the necessary hydraulic steam pumps, tank, etc., for pressing bark into bales. All of the aforesaid machinery defendants guaranteed to be done in a workmanlike manner and of first-class material, and set up aboard the said boat at said city of Cincinnati; and by the terms of said contract said defendants guaranteed all of said machinery to have a sufficient capacity to do, and would do the required work, and would pass government inspections; and further, defendants guaranteed, as a part of said contract, that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, and that the time necessary for pressing and delivering each bale of bark would be two and one-half minutes."

Plaintiff further avers, in said petition, that the defendant wholly failed to construct, erect and complete said machinery according to said contract, and wholly failed to erect and complete said machinery within the time set forth in said contract, and have not constructed, erected or completed said machinery to the date of bringing suit; and said defendants have wholly failed and refused to perform said contract.

By way of further breach, the petition avers that, between the 23d of June, 1881, and the 1st of April, 1882, the defendants constructed and erected, on said boat, certain machinery not of the quality, material and workmanship set forth in said contract, but of insufficient and inferior material, and inferior and defective in quality of workmanship, and useless and insufficient for the purposes set forth in the contract, which wholly fails to do the work required of it according to said contract and for which it was constructed and erected; that the hydraulic machinery covered by and embraced in said contract is constructed of insufficient and inferior material, wholly unfit and insufficient in capacity, of defective and inferior workmanship, and wholly useless to perform the purpose set forth in said contract and for which it was constructed and erected; that it wholly fails to comply with the terms of said contract and guaranty, and will not give, sustain, nor work up to the fifteen hundred tons pressure, as guaranteed by defendants; and is inferior and defective in quality and character of workmanship and unsafe.

And the petition further avers that the plaintiff has wholly performed the parts of said contract on its part to be performed, and has complied with all the terms thereof, and has paid to said defendants on account of said sum of $23,700, in advance of the time when the same was to become due, divers sums, in all amounting to $16,500.

And the petition further avers that, by the contract, the machinery was to be constructed, erected and completed on board said boat within sixty days from June 23, 1881, in order to enable plaintiff to operate said boat and machinery on the Tennessee river, during the fall season of 1881, in the pressing of tan bark; and defendants agreed to have it so constructed, erected and completed, so as to enable plaintiff to operate said boat, and with the full knowledge on the part of defendants, before making said contract, of the said purpose and desire of plaintiff; that in pursuance of said purpose the plaintiff purchased twenty-five hundred tons of tan bark for the sum of fourteen thousand dollars, and held it ready, at various points on the Tennessee river, to be used and pressed by plaintiff immediately upon the completion of said machinery according to such contract; which said bark, until compressed by said machinery, was unfit and unsuitable for shipment from the points where it was so held by plaintiff; and which said bark, to the amount in value aforesaid, has become a total loss to plaintiff by exposure, and deterioration thereby; that said loss of such tan bark was wholly caused by the failure of defendants to comply with their contract to construct, erect and complete said machinery according to said contract; that the purchase and holding, by plaintiff, of said bark, for the purpose of being so compressed as aforesaid was well known by said defendants, at the time said contract was made; and said bark was purchased and held by said plaintiff for said purpose, as defendants well knew at said time, on the faith of the performance by defendants of said contract in the manner and at the time therein provided.

The petition further avers that by reason of said breach of contract it has incurred large expenses in the employment of agents and the purchase of material and other ex-

penses; that it has been wholly unable to use said boat; that said boat and said machinery are wholly useless and of little value, and plaintiff has hitherto been unable to use the same. Wherefore plaintiff has, as it says, sustained damages in the sum of sixty thousand dollars, for which it prays judgment.

To the foregoing petition the defendants filed an answer and an amendment to the answer. The answer, (Record, 6, 7) admits that the plaintiff is a corporation and citizen of New Jersey, and that the defendants are resident citizens of the Southern District of Ohio; avers that the defendants have no knowledge or information sufficient to enable them to form a belief whether the plaintiff is the owner, of valuable patents for the manufacture and sale of pressed tan bark, or whether it entered into a contract with James Mack, as alleged in the petition; the answer therefore denies each and every averment of the petition in that regard.

It further avers that the defendants have no knowledge or information sufficient to form a belief as to the truth of the averments of the petition relative to the cost of the steamboat, and therefore denies that the steamboat and necessary equipments have cost the plaintiff, including insurance and expenses, a sum in excess of fourteen thousand dollars. Each and every other averment of the petition they deny.

The amended answer was filed by leave of court, and by way of further defense, without withdrawing the original answer, and in accordance with the Ohio practice, is numbered second, third and fourth defenses.

The *second* defense, protesting that the contract of June 23, 1881, was not made with defendants, but with the McGowan Pump Company, a corporation of Ohio, says that if

it shall appear, on the trial, that the contract was made with them and not with said corporation, then it denies that the contract, as made June 23, 1881, provided that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred pounds, or that the time necessary for pressing and delivering each bale of bark would be two and one-half minutes. This defense further avers that said contract, as originally executed, contained neither of said provisions, and that if it should appear that, by a subsequent modification of such contract, such provisions were added to and became a part thereof, then they were added without consideration.

The *third* defense avers that, on or before March 30, 1882, extra work, not required by the contract, to the amount of $1,582.51, had been furnished to The American Tan Bark Company, being the same extras described in the contract hereinafter copied, and that in consideration of the transfer to The Pressed Tan Bark Company, of all the machinery in the said contract of June 23, 1881, and said extras, with receipt in full for all material and machinery furnished T. J. McGowan and Bliss, the said contract, of June 23, 1881, was wholly released and discharged, and other terms of agreement substituted therefor, by the execution and delivery between the parties thereto, on March 30, 1882, of a contract in the words and figures, to wit (Record, 10, 36,):

"CINCINNATI, O., *March* 30, 1882.

In consideration of $11,200, to be paid us, we hereby transfer to The American Pressed Tan Bark Company, of New York, all the machinery embodied in our contract, and extras, with receipts in full for all material and machinery furnished T. J. McGowan and Bliss by other parties for steamer "Tan Bark." The terms of this sale are as follows: To continue all former agreements and guaranties except time required to press bark into bales and removal

from cylinders. We further agree to transfer to said company all special patterns made for our hydraulic machinery, and also agree to transfer to said company our exclusive interest in the accumulator and double-end arrangement on hydraulic press for bark purposes only.

It is hereby agreed that the above guaranty, covering hydraulic machinery, extends only to the strength of material only up to the fifteen hundred tons pressure. We hereby acknowledge receipt of $4,000 balance, to be paid on presentation of receipts as above.

All erasures and changes made before signing.

THE McGOWAN PUMP CO.
AMERICAN PRESSED TAN BARK CO.
By S. H. BEACH, *Attorney.*"

And the said defense further avers that the $4,000, described, in the petitition, as paid March 30, 1882, being part of the $16,500 hereinbefore referred to, was paid under the said contract of March 30, 1882, and that no other or further payments have been made under said contract, although the same has been fully complied with by said McGowan Pump Company.

The *fourth* defense avers that, in March, 1882, the plaintiffs took possession of and accepted the machinery, constructed on said steamer "Tan Bark," as and for the full performance of the contract of June 23, 1881, and waived any claim for further performance thereof, and have prevented any further performance, if such were necessary, and have made divers and sundry changes in the machinery, so as to prevent and render impossible any such further performance, if such were necessary, and employed the McGowan Pump Company of Cincinnati to do work to be used in making other changes and alterations, which last-named work amounts to the sums of $1.384.96 and $146.50, for which action is now pending against the plaintiff on behalf of the McGowan Pump Company; and have removed the steamer "Tan Bark" and all said machinery

into the State of Tennessee, and converted the same to their own use.

To this amendment to the answer, a general demurrer was filed April 5, 1883, and on the same day a reply. The reply, (Record, 12) to the *second* defense, denies that the provisions of the contract, that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, were wholly without consideration, and denies each and every allegation contained in the second defense not admitted in the petition to be true; and, for reply to the *third* defense, avers that the written instrument, set forth in said *third* defense, was executed by and between the parties to this case, on the 30th day of March, 1882; that it paid to the defendants the sum of $4,000, and denies each and every allegation, contained in said *third* defense, not admitted, in the petition or in the reply, to be true.

And the reply further avers that said written instrument of March 30, 1882, was procured from plaintiff on the faith of representations, made by defendants, at the time and prior to its execution, that they had operated and tested said hydraulic machinery up to a pressure of one thousand tons, and that the bales of bark pressed by them on the trial made of the machinery on March 27, 1882, had received a pressure of one thousand tons from said machinery, and that said machinery, as so constructed, had been by the defendants operated under said pressure of one thousand tons; that said representions were wholly untrue; that said defendants never did, at any time, operate said machinery under such pressure, and never tested said machinery up to said pressure; and never did give any bales of bark such pressure; and had plaintiff known that said

representations were untrue, it would not have executed said written instrument; that said hydraulic machinery never has worked, and never will work, up to a pressure of fifteen hundred tons; that the said machinery wholly fails to comply with the agreements and guaranties, made by the defendants, and described in the petition, that said written instrument was signed on the faith of said representations, and that, on discovering the untruth of same, plaintiff immediately notified defendants that said agreement was null and void, and the same was thereupon abandoned by the parties thereto.

The reply, to the *fourth* defense, admits the removal of the steamer "Tan Bark," with certain machinery thereon, from the jurisdiction of the court; admits certain changes and alterations in a portion of the machinery; and denies each and every other allegation of the *fourth* defense, not admitted in the petition or reply to be true.

It further avers that defendants wholly failed and refused to comply with their contract, and wholly failed to make said machinery comply with the purpose for which it was constructed, and having failed and refused to do any further work on said machinery, the plaintiff made certain changes, in order to improve said machinery, and make it operative for the purpose for which it was to be constructed, all of which changes and alterations were necessary; in doing which the plaintiff made contracts with various persons, for the construction of said changes and alterations, and incurred heavy expenses in so doing.

We can not find any entry in the record disposing of the demurrer, and suppose it was (practically) withdrawn by the filing of the reply.

The trial of the case began on April 3, 1883, and the verdict was rendered May 8, 1883, on which day the de-

fendants moved for a new trial, (Record, 24), alleging, as reasons, the admission of incompetent testimony, the exclusion of competent testimony, error of the court in instructing the jury, error of the court in refusing instructions asked for by the defendants, that the verdict of the jury was contrary to law, that the verdict of the jury was contrary to the evidence, and that the damages were excessive, and also moved to arrest the judgment. The court overruled the motion and entered judgment.

The Bill of Exceptions, (Record, 25 to 72,) shows that each party gave evidence tending to support the issues on his behalf, and that, at the end of the testimony, special charges were asked by both sides, some of which were given and some refused by the court. The whole of the general charge was inserted in the Bill of Exceptions, at the request of the plaintiff. Portions of it were excepted to by the defendants. We shall hereafter, in the course of the argument, state the portions of which we now make complaint, but it seems unnecessary to repeat them here.

ASSIGNMENT OF ERRORS.

The assignments of error may be found printed on page 74 of the record. They consist substantially in errors of the court below: First: In overruling the instructions asked by the plaintiffs in error, defendants below. Secondly: In giving the instructions asked by the plaintiffs below. Thirdly: In the general charge. Fourthly: In overruling our motions for new trial and in arrest of judgment.

These errors for convenience of the argument may be subdivided into classes. *First* are errors relating to the relations of the parties to each other, McGowan and Bliss

claiming that they entered into the contract, as a corporation, under the name of the McGowan Pump Company, and not as partners; the plaintiffs, The American Pressed Tan Bark Company, claiming to the contrary. In this connection, and in order that it may contribute to a better understanding of the case by the court, it is perhaps well to explain that the first suit between these parties was brought in one of the state courts of Ohio by the McGowan Pump Company, as a corporation, against The American Pressed Tan Bark Company, for the amount remaining due under contract, in which action the steamer "Tan Bark" was attached; that immediately thereafter the present action was brought, and, at a later date, the action first brought, namely, by the McGowan Pump Company, as a corporation, was removed into the Circuit Court, and is there still pending, and is the other action referred to in the record. Although brought first, it assumed a later number and standing, on the docket, because the removal brought it into the Federal court at a later date than the bringing of the present suit.

The *second* class of errors, of which we complain, relates to the right of the plaintiff to recover on the contract, assuming that its suit was brought properly against the defendants as partners. The petition, it will be observed, counts upon the contract, alleges its performance by The American Pressed Tan Bark Company, and is wholly inconsistent with a recovery upon the theory that its performance by the Tan Bark Company was in any respect waived or modified by the consent of the defendants, or that there is any estoppel upon which the Tan Bark Company may excuse non-performance by it. The importance of this class of errors grows out of the fact that it was not pretended, at the trial, that the steamer "Tan

Bark" was finished, or in a sufficient state of readiness to receive the machinery, within sixty days from June 23, 1881, and yet the basis of the judgment is non-performance by the defendants according to the terms of the contract, which necessarily involved the delivery or tender of the steamer by the plaintiff, in condition to receive the machinery within sixty days after June 23, 1881, or rather so early during said period of sixty days as to give time for the putting the machinery on board.

The *third* class of errors complained of relates to the contract of March 30, 1882, which was treated by Judge Hammond as only modifying the original contract of June 23, 1881, by eliminating from the latter the guaranty that the machinery would press one bale of bark in each two and a half minutes, without further effect.

The *fourth* class of errors grows out of the charge of the court that the amount due and unpaid on account of the contract is not to be deducted from the damages; that is, that the Tan Bark Company is to have the equivalent in damages for full performance without paying the contract cost price of the work.

There are other errors not so easy to classify and state together, but which may be treated under a *fifth* head as miscellaneous errors.

Upon these propositions we submit the following argument:

ARGUMENT.

I.

The record shows, (page 40,) that the plaintiff asked the court to charge, and the court did charge, that if the defendants prior to the making of the contract of June 23, 1881, held themselves out to the plaintiff as partners, and the plaintiff having dealt with them as such prior to the making of the contract, entered into the contract believing them to be a firm, and without notice of their corporate character, then the defendants are liable on the contract even if they were in fact acting, not as a firm, but as a corporation, when it was made. This instruction was twice repeated in different language. On the other hand the defendants asked the court, (Record, p. 43,) to charge the jury as follows:

"If the McGowan Pump Company, which entered into the contract of June 23, 1881, was in fact an incorporated company, and not a partnership, then the plaintiff can not recover in this case, whether the plaintiff supposed it to be a partnership or not."

And again at pages 46, 47:

"If the agent of the plaintiffs sent here to make contract for this work did contract with the McGowan Pump Company, and had it explained to him that the said company had organized as a corporation, and the defendants went on under said corporation, and did the work provided for, which the plaintiff subsequently took from said corporation, they can not now deny that they dealt with the said corporation."

It will be observed that the first and second charges

given at the instance of the plaintiff, (Record, 40,) do not specify any limit of time

"prior the making of the contract of June 23, 1881,"

at which, or during which, the holding out of the defendants to the plaintiff as partners, and the dealing of the plaintiff with them as such, would have the effect, in the absence of notice of the change of the firm from a partnership to a corporation, to fix the liability of the defendants as partners. It is not intended to deny the familiar rule that where a partner, to whom credit has been, or may have been given by a customer, secretly withdraws from a firm without notice to that customer, he may be held liable. *Lovejoy* v. *Spafford*, 93 U. S. 330. A totally different rule applies, we submit, to corporations. Corporations are organized in pursuance of law. In Ohio, they possess a public character; the record of their organization is in the office of the Secretary of State. There can be no such thing as a concealed or hidden corporation. Manufacturing corporations, to which class this company belongs, are required by section 3855, Rev. Stat. Ohio, to establish and publish notice of the place of its principal office. The court will not presume that this was not done.

In the next place there was nothing before the jury to justify these charges. The Bill of Exceptions states that the plaintiff and defendants were in correspondence prior to the organization of the corporation, but there had been no *dealings* whatever between them; and the Bill of Exceptions does not profess to state any prior to the organization of the corporation. The question then, to be decided by the court, is this: Is it the law of the land, where parties

enter into a correspondence, and, during the course of the correspondence, one of them is organized as a corporation, and, after such organization, enters into a contract in its corporate name, that the fact that the same name had been used by the promoters of the corporation, before corporate organization, in correspondence, but not in any transaction or dealing or contract whatever, a verdict and judgment is justified against them as individuals, or a recovery by them as a corporation, prevented, upon a contract, which, in point of fact, was made by them in their corporate capacity. We submit not. The use of the old letter heads amounts to nothing. *Cooke* v. *Slate Co.*, 36 Ohio St. 135.

In the next place the charges are misleading. They fix no period or limit of time, prior to the making of the contract of June 23, 1881, in which a dealing between the parties becomes effective to withhold from the defendants the protection of their subsequent corporate organization. To make the charge good law so as to do justice between the parties, it seems to us that it should be modified so as to say "shortly prior." On the theory of these charges, any period of time, no matter how long, might have elapsed between the prior dealing and the subsequent dealing; and if, at the time of any, however remote, prior dealing, the parties had held themselves out as a partnership and dealt as a partnership, they could not afterwards, at any later date take the benefit of their corporate organization.

The refusal of the court to give the 31st charge asked by the defendants, (Record, 46, 47,) was wholly inexcusable, and had a serious tendency to mislead the jury, and to prevent the general charge from having its proper effect upon their minds. How can it be possible that a verdict can stand in a case against individuals as partners, when known corporate existence at the time of making the con-

tract has been shown. If the plaintiff's agent sent to contract for the work did in fact, knowingly contract with the corporation, and if the defendants did the work as a corporation, the attempt to hold defendants liable as a partnership is a mere impertinence.

II.

The second class of errors, of which we complain, grows out of the fact, that this action is brought for the breach, by McGowan and Bliss, of a contract, which, according to the plaintiff's petition, had been fully performed by The American Pressed Tan Bark Company. The petition as already shown avers, in so many words, (Record, 3,) that

"it has wholly performed the parts of said contract on its part to be performed,"

and it avers as breach of the contract that McGowan and Bliss

"have wholly failed to construct, erect and complete said machinery according to said contract, and defendants have wholly failed to erect and complete said machinery, *within the time set forth in said contract*, . . . And said defendants have wholly failed and refused to perform said contract."

And further the petition, (Record 3, 4,) seeks to recover damages, because of the alleged loss of tan bark, which had been bought, and stored on the Tennessee river, ready for pressing, before the making of the contract, with a view to the completion of the contract at the time prescribed by its terms. As the answer denies all averments of the petition not admitted, it follows that the plaintiff could recover, in this case, only upon proof that it had per-

formed the contract according to its terms, and that the defendants has failed to perform according to its terms. The issue thus made is wholly inconsistent with a recovery on the theory, that the defendants had waived the performance of any part of the contract, or released the plaintiff from such performance. *Mcburin* v. *Stone*, 37 Ohio St. 49.

Upon this part of the case we submit, *first*, that the motion to arrest the judgment should have been granted. The petition is fatally defective, unless the averment of performance by the plaintiff is to be treated as an averment that after the 23d day of June, 1881, and in sufficient season before the end of the period of sixty days, within which the defendants were to perform, the plaintiff had so far completed the construction of the boat so that it was, in fact, ready for the reception of the machinery.

In the *second* place the plaintiff could not recover, on the issue thus made, except by proving, (or in case the contrary were proved,) that the boat was ready for the reception of the machinery in time to have allowed it to be placed thereon before the end of sixty days from June 23, 1881. But on the trial of the case, (Record, 29,) the defendants gave evidence,

"that the boat was not launched or presented for the machinery until November, 1881; . . . that the boat was not ready for their work until about the 10th of November, 1881."

And further, they proved that the delay in the progress of the work was wholly caused by the non-completion of the boat, and by its insufficient character when claimed to be completed. There was no evidence whatever, given to the jury, tending to show that the boat was completed, or in a sufficient state of progress, to have received the machinery, within sixty days from the 23d of June, 1881; on the con-

trary, the plaintiff's own testimony, (Record 26, *folio* 50,) showed that the boat was launched in November, 1881, and not sooner.

Plaintiff's Exhibit I, (Record 36, folio 75,) consists of a letter from the defendants to Beach, plaintiff's attorney in fact, dated September 5, 1881, in which they say to him that

"There is not nor has there been enough water in our river to launch boat for a month, and appearances are against there being enough for some time to come."

Plaintiff's Exhibit R, (Record, 39,) is a letter from defendants to James Mack, the boat builder, dated October 17, 1881, beginning:

"Some two weeks ago you notified us that the boat was ready for delivery. On examination we find that there are 52 floor timbers broken and bottom plank is sprung off timbers; also hull is hogged and twisted, both ends down, and not sufficiently streak-bolted; also she is not sufficiently side-stiffened, needing a side-studding every 12 or 15 feet, 8 x 8 of oak and 4 to 6 screw-bolts, with heavy washers on each; also a stern water-tight bulkhead athwart ship of 3" pine. Owing to the timbers being broken it will be necessary to dock her."

With further complaints not necessary to reprint.

Also plaintiff's Exhibit S, (Record, 40,) consists of plaintiff's letter *per* Beach, to defendants, dated October 25, 1881, containing the following sentences:

"You will therefore telegraph me as soon as the boat is off dock. Also please telegraph when she is placed on dock. I shall endeavor to be on hand as soon as Mr. Mack is prepared to make delivery, so as not to cause a moment's delay."

On this state of testimony, the plaintiff asked the

court to give, and the court gave, the fourteenth special charge, (Record, 42):

"14th. If the jury find that the contract—made as alleged with defendants, and that after the day named for the completion of the contract, the work not being then completed, that the boat was not then in readiness to receive it; yet if the boat was thereafter made ready by James Mack, and the defendants proceed under the contract they were then bound to complete it within the same length of time contemplated by the original agreement and such additional time as may have been lost in the prosecution of the work, occasioned by Mack's delay in the construction of the boat, and failing in this they are liable for the consequences of such failure and delay."

We submit that the court erred in giving this charge. *First*, the plaintiff was not entitled to this charge under the issue; and *secondly*, assuming the facts to have been as stated in the charge, nevertheless if the boat were not completed in time to receive the machinery within the sixty days provided by the contract, the contract of the defendants, if they proceeded in the construction of the machinery, became an agreement to deliver the machinery within a reasonable time after the boat should be made ready for its reception and not otherwise.

The true rule, as it seems to us, applicable to this case was presented by several instructions, asked by the defendants, each of which was refused by the court, to wit, (Record, 43):

"4th. That the contract sued on is entire and entitled the plaintiff to have the machinery therein described built and set up on board a boat furnished by the plaintiff within 60 days from June 23, 1881, and if the plaintiff failed to furnish such boat until after the said period of 60 days from June 23, 1881, had expired, and by reason of such failure the defendants were unable to begin to set up such machinery on board said boat until after the expiration of said period of 60 days from June 23, 1881, then the defendants are entitled to recover."

And further, (Record, 45):

"21. We ask the court to charge the jury that if the boat was not ready for the machinery in time to have the same put up within 60 days from the date of the contract, but that the parties subsequently proceeded at the request of Beach to put the machinery upon the boat, they were only bound to proceed with reasonable diligence under the circumstances, and were not bound to complete the same within 60 days thereafter if the boat or foundations provided for the machinery were so insufficient as to prevent such completion within said time."

And again, (pages 45 and 46), the defendants asked the court to instruct the jury as follows:

"23. That, as the machinery was to be put up on a boat to be furnished by the plaintiff, to require of the defendants that they have the machinery furnished and put up on the boat within the 60 days, the plaintiff must have had the boat ready and fit for the purpose in time to enable the defendants to have put the machinery in place upon the boat, the same being ready therefor within the 60 days, and if the boat was not ready in such time, then the plaintiff can not recover damages for not having the said machinery so completed within 60 days. In such case the defendants were only bound to proceed with due diligence under the circumstances."

The following portion of the general charge was also excepted to and is embraced within the same argument, (Record, 48):

"If the jury find the contract was made, as alleged, with the defendants, and that after the day named for the completion of the contract, the work not being then completed, that the boat was not then in readiness to receive it, yet if the boat was thereafter made ready by Mr. Mack, and the defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement and such additional time as may have been lost in the prosecution of the work occasioned by Mack's delay in the construction of the boat, and failing in this they are liable for the con-

sequence of such failure and delay. Therefore the court charges you that the defendants are only liable for any damage caused by delay for the period of delay found by application of the above rule to the proof in this case."

When the Tan Bark Company failed to have the steamboat ready, for the erection of the machinery, in time for performance of the contract according to its terms, they prevented the performance of the contract. This, in effect, ended it, and left the parties to make new terms of dealing. Any further contract must be implied from the circumstances. That they went on, on both sides, to perform what was left of the contract, by no means involves mere postponement, or shoving along of the former agreement as to the time of performance. On the contrary, there were no specified terms of contract, and the real contractual relations between the parties were left to be implied from the circumstances. That is altogether a false view, one which the law does not impute to them, and inconsistent with their position, which keeps the original contract as to time in force, simply postponing its effect by the number of days wasted by the plaintiff. No evidence can be found in the bill of exceptions tending to favor the theory that the defendants agreed or would have agreed to erect this machinery within sixty days after the delivery of the boat, in November, 1881. Their original contract was not, to put up the machinery within sixty days after the delivery of the boat. It was to erect the machinery within sixty days from the 23d of June, 1881, and this was, necessarily, upon the undertaking and promise, of the plaintiff, to have the boat ready for the machinery in such season before the end of the sixty days, as to enable them to comply with the contract on their part. Because the defendants were willing to contract to deliver the machinery, within sixty days from the 23d of June, it by no

means follows that they would have agreed to erect the machinery at any earlier or later date with the same speed. Iron can not be handled during the winter months with the same ease, comfort or celerity that the summer permits. A stone or brick-mason might agree to erect a house within sixty days, say from June 23d, who would never consent, who could not, in fact, in this climate, perform such a contract within the same or a much longer period of time after the 15th of November.

Again, if the boat had been delivered in season, after the 23d of June, to have erected the machinery by the end of sixty days, the defendants might have had their workmen at hand, and not on strike, their contracts for iron made, and all their arrangements completed, or believed to be completed, so as to justify them in fixing a limit. All the conditions of such an enterprise might be changed in the winter, or at any later date. Therefore it is, as we respectfully submit, that no authority can be found to justify the proposition that when a party has broken a contract by rendering its performance impossible within a stipulated time, and, after the time has expired, the parties go on on both sides to perform the contract, that part of it which has been rendered impossible springs into renewed life and becomes again binding. It is not pushed along in point of time. That part of it is ended in law, as it is in fact.

This contract was not in fact performed within sixty days from the 23d day of June, 1881. Its performance was rendered impossible by the fault of the plaintiff. This part or term of the contract therefore has been eliminated by the act of the plaintiff. This did not interfere with the performance of the residue of the contract, namely, furnishing the boat and paying the money on one side, and building the machinery on the other. But the element of

time has been eliminated, and there can be no rational or just conclusion except that the implied contract, or new contract implied from the acts of the parties, was to be performed within a reasonable time, which might be more or less than sixty days after completion of the boat.

It must not be forgotten that performance within sixty days from the 23d of June, 1881, and payment at the end of such performance, is just as essential a term of the contract to the defendants as to the plaintiffs. This is not a provision which the plaintiffs might waive and hold the defendants to the rest of the contract. This was a clause which the defendants had a right to insist on, and which the plaintiffs absolutely erased from the contract by failing to furnish the boat in season to permit its performance.

A descriptive statement, such as of time, has been held by this court to be a warranty or condition precedent, upon the failure or non-performance of which the party injured might repudiate the whole contract.

Norrington v. *Wright*, 115 U. S. 188.
Filley v. *Pope*, 115 U. S. 213.

Because the parties saw fit to perform the other items of the contract, the time having passed, it does not follow that they adopted a merely postponed time, as Judge Hammond thought. The rule applicable to the new contract, as in other cases where time is not stated, must be that of reasonable time. 1 Chitty on Contracts, 432.

We quote the following passage from Leake on Contracts, page 850. It is abundantly sustained by the cases which Mr. Leake cites:

"Nor can a party object on the ground of delay after an acquiescence on his part in the delay. . . . So by

accepting the abstract of title the purchaser is held to waive the objection of delay in delivering it. . . . Nor can a party object to complete a contract on the ground of delay which he has himself caused."

On page 836, Mr. Leake says:

"Where there is no time fixed by the contract the law in general implies that the performance must be at a reasonable time, having regard to the nature and circumstances of the performance. Co. Litt. 56*b*."

The element of time having been eliminated from the obligations of the parties under the contract, by the lapse of the stipulated time, performance of the residue of the contract therefore being necessarily without regard to the stipulated period, was to be made in a

"reasonable time having regard to the nature and circumstances of the performance."

This rule is just, and does not make a new contract for the parties. It does not imply that they would have agreed to deliver the machinery in the winter as speedily as in the summer, or at any season of the year, or under any circumstances, as speedily as at the season, and under the circumstances, at and under which they made the bargain. At the same time it effects what Mr. Parsons, (2 Parsons on Contracts, * page 61,) lays down as the true rule:

"That is a reasonable time which preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer."

III.

The third class of errors committed by the court relates to the effect of the contract of March 30, 1882, set up *in haec verba* in the third answer, and copied by us on page 7, *ante*. On our theory, this contract, of March 20th, was substituted for all preceding contracts, and should have been the basis of the suit. The court treated it as a mere waiver of the provision of the original contract contained in the postscript to the defendants' letter of April 23, 1881, (Record, 33,) in these words:

"Time required for each pressing and delivery of bale 2½ minutes."

This difference of opinion between counsel and the court as to the contract of March 20, 1882, is shown in charges asked by plaintiff and given by the court, in charges asked by the defendants and refused, and in the general charge. The theory of the plaintiff was presented to the court in its *tenth* special charge, (Record, 42,) as follows:

"10. If the jury find that the contract of March 30, 1882, was duly made and is binding between the parties, it in nowise affects the right of the plaintiff to recover for any breach of the original agreement between the parties upon which this action is founded, or of the guarantees contained in such original agreement, except for the failure in respect to the time required to press bark with the machinery into bales, and to remove them from the cylinders. All the other obligations and guarantees of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30, 1882."

The defendants' theory was presented to the court by several instructions, refused by the court, as follows, (Record, 43):

"5. That the plaintiff can not recover upon the issue in this cause if it appear to the jury from this testimony that the contract, which has been read in evidence, bearing date March 30, 1882, was, in good faith, executed and delivered by both the parties to this cause."

"10. That the plaintiff does not entitle itself to recover upon the contract of June 23, 1881, by showing that the defendants failed to comply with the contract of March 30, 1882."

And further, (Record, 43, folio 90,):

"That even if it be true and believed by the jury from the testimony that the contract of March 30, 1882, was broken by the defendants by non-delivery of the receipts or of assignments of patent rights therein described, nevertheless such breach does not entitle the plaintiff to recover in this case upon the contract of June 23, 1881."

To the same effect is the twelfth charge asked by the defendants, (Record, 44).

"12. A breach of the contract of March 30, 1882, entitles the party who did not break such contract, if it suffered damages by reason of such breach to recover in an action for such damages, founded upon such contract, but it furnishes no ground for recovery in this case upon the contract of June 23, 1881, for damages suffered by reason of a breach of the last-named contract."

Another view presented by the defendants is to be found in the 14th charged asked by them, (Record, 44):

"14. That by the contract of March 30, 1882, the parties waived and withdrew all previous agreements and guarantees relating to the hydraulic machinery, except only that the material of which it was composed had sufficient strength to work up to a total pressure of (a thousand) tons, and that the defendants are not liable to damages in this action for any defect in said hydraulic machinery if said material had sufficient strength to work up to such pressure, unless under the charge of the court the jury believe from the testimony that the said contract was pro-

cured by fraud or false representation, and is therefore not binding upon the plaintiff."

And again, (Record, 46):

"28. If it appear, in this case, that the machinery contracted for in the contract of March 30, 1882, was not possible to be made as working machinery because the material of which it was to be made was not capable of sustaining any such working pressure, yet that the material used by the defendants was of the strength of 1,500 tons, then the contract of March 30, 1882, must be construed as relating to the strength of the material and not to the working capacity of the machinery."

The view taken by the court is shown by the following extracts from the general charge, relating to the contract of March 30, 1882, excepted to by the defendants, (Record, 47):

"But the plaintiff has not sued on that contract nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine and nothing else. This contract is pleaded by defendants as a defense to a claim of breach, and so setting it up the only question is whether it constitutes a defense. It is only a supplemental contract to that of June 23d. It continues the guarantees of that contract with the exception as to time. It does not make new guarantees for a new consideration, but obligates the defendants to carry out the old contract with the named exception and imposes on defendants new obligations about the patterns, etc., which are independent and separable from the old contract and the old consideration. The court, therefore, charges you that its only effect is to reduce the original guaranty for the capacity of the machine in respect to the time for pressing the bale if you find there was no fraud in procuring it; if there was such fraud it leaves that guaranty still in force."

And again, (Record, 48):

"The defendants claim that its proper construction requires that 1,500 tons only applies to strength of material to endure that pressure as a maximum of endurance, not for a continuous working pressure. It belonged to the

plaintiff to say what it wanted and to defendants to consider it when they made the contract whether they could give that which was wanted. There is no proof tending to show that the proper construction is that the plaintiff only wanted a machine of sufficient strength to endure a test of 1,500 tons; but on the contrary, read in the light of the circumstances proved, the language of the contract clearly means that the plaintiff wanted a machine by which they could deliver on each and every bale a compression of 1,500 tons if they chose so to use it, and which would endure the work for the length of time such a machine would wear under prudent and reasonable management by the plaintiff."

Also, (Record, 49):

"If the jury find that the contract of March 30, 1882, was duly made and is binding between the parties, it in nowise affects the right of the plaintiff to recover for any breach of the original agreement between the parties upon which this action is founded, or of the guarantees contained in such original agreement, except for the failure in respect to the time required to press bark with the machinery into bales, and to remove them from the cylinders. All the other obligations and guarantees of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30, 1882."

The contract between the parties, upon which suit was brought, is contained in an accepted proposition, from the McGowan Pump Company to S. H. Beach, as attorney in fact for the American Tan Bark Company, dated June 23, 1881, (Plaintiff's Exhibit A, Record, 31). This contract does not fully specify the power which the machinery was to have, but refers to it by the following stipulation:

"All to be done in a workmanlike manner, and of first class material, and set up aboard your boat in Cincinnati, Ohio, for the sum of twenty-three thousand seven hundred dollars ($23,700), the above machinery to have a sufficient capacity to do the required work, and guaranteed

and to pass government inspection. To be completed in sixty days."

After the acceptance of this contract by Beach, Darwin, president of the Tan Bark Company, wrote to the defendants, June 30, 1881, (Plaintiff's Exhibit B, Record, 32,) that the contract is

"entirely satisfactory, as we understand—that is, that the capacity of the presses, etc., are in keeping with guaranty expressed in your letter of April 23, 1881, which we consider a part of your contract, in so far as guaranty of the presses are concerned."

To this the defendants answered, July 5, 1881, (Plaintiff's Exhibit C, Record, 32):

"Our contract is in accord with ours of April 23. Of course, we do not know nor could we guarantee any thing in reference to whether the bark will bale or not, or weight or size of bale. That we consider an experiment, and can only be demonstrated by test."

Letter of April 23d, (Record, 33,) is plaintiff's exhibit D, containing plan for bark press, closing with these words:

"22" press can be used up to 1,500 tons pressure. P. S.—Time required for each pressing and delivery of bale, 2½ minutes. We guarantee the whole."

Plaintiff also relied on a letter from the defendants to Darwin, dated May 20, 1881, (Record, 33, Plaintiff's Exhibit E,) which contains the following sentence:

"We do know the motions can be made in 2½ minutes and the pressure 1,500 tons given, but what kind of a bale it will be we do not know."

At the time of the contract of March 30, 1882, $12,500 had been paid by the Tan Bark Company on the original

contract for $23,700, leaving $11,200 still unpaid, and the machinery was on the boat, afloat in the Ohio river. $4,000 were paid soon after the execution of this contract, on account of the $11,200, making in all $16,500 paid, and leaving $7,200 still due; and the contract consists of an absolute transfer of the machinery on the boat, described as

"all the machinery embodied in our contract and extras;"

with receipts in full for all material and machinery furnished the defendants by other parties for the steamer "Tan Bark."

The written contract provides,—and if this were all, a plausible argument might perhaps be made to sustain Judge Hammond's ruling, namely,

"The terms of this sale are as follows: To continue all former agreements and guarantees except time required to press bark into bales and removal from cylinders."

The agreement then proceeds to make a further new contract for the defendants, by which they agree to transfer to the Tan Bark Company all special patterns made for their hydraulic machinery and their exclusive interest in the accumulator and double-end arrangement on hydraulic press for bark purposes only.

The plaintiffs and Judge Hammond read this contract as if it ended here, with the addition of the closing words acknowledging the receipt of the four thousand dollars by the Pump Company. But the contract does not close here. It contains the following language, which we claim fully sustains our contention:

"It is hereby agreed that the above guaranty cover-

ing hyd. machinery extends only to the strength of material only put up to the 1,500 tons pressure."

This language is part of the contract of March 30, 1882. It is an essential portion of it. It is entirely and wholly obliterated and eliminated from the contract by the ruling of the Circuit Court, and by the contention of the plaintiff. But the parties used it; saw fit to insert it. The language,

"to continue all former agreements and guarantees except time required to press bark into bales and removal from cylinders,"

is not the only language of the contract; but it is modified by the later, the subsequent words,

"that the *above* guarantee covering hyd. machinery extends only to the strength of material only up to the 1,500 tons pressure."

This is a withdrawal of all guaranties relative to the hydraulic machinery, except that the strength of the material should be such as to bear 1,500 tons pressure. Whether this means 1,500 tons pressure continuously as a working pressure for an indefinite period of time, defined in law as "reasonable time," or for a shorter period, is immaterial to this case. The court in effect told the jury it meant nothing, advising them that the contract of March 30, 1882, affected the prior contracts only in withdrawing the guaranty of time required to press bark into bales and removal from cylinders.

It is evident from an examination of this contract, (Record, 10, 36,) that the earlier part of it was written on the theory that all former agreements and guaranties were to be continued, except as to time required to press bark

into bales and remove from cylinders; that the contract in this form having been submitted to the parties, was found insufficient, and then a modification, distinctly stated as such, was made in the following language:

"It is hereby agreed that the *above* guaranty covering hyd. machinery extends only to the strength of material only up to the 1,500 tons pressure."

In the *first* place, that this is a modification or change of the earlier part of the agreement is indicated by the use of the words "*above* guaranty."

It is obvious, in the *second* place, that upon Judge Hammond's construction these words were unnecessary, and that, according to him, the language thus introduced does not modify or in any respect alter the "*above guaranty.*"

In the *third* place, the word "only" is twice used. This is in the original, and it was done on purpose. In printing the record in this case, (at page 10,) the printer seems to have thought that one of these "onlys" was unnecessary, for he has italicized the second, which is not in the original, nor in the manuscript from which he printed, and is not in the copy as printed on page 36.

What is meant by the guaranty is plain on its face,

"that the above guaranty covering hydraulic machinery."

that is to say

"all former agreements and guaranties"

as far as they relate to hydraulic machinery, extend only, or are limited, to the strength of material, and as to it only, up to the 1,500 tons pressure.

The consideration of this contract is the payment of

the residue of the original contract price, namely, $11,200, *together with a receipt in full for all extras*, and an agreement to deliver all special patterns for the hydraulic machinery, and to transfer, to the Tan Bark Company, the exclusive interest of the McGowan Pump Company in the accumulator and double-end arrangement on hydraulic press for bark purposes only.

Reference to the original agreement as contained in the letter of June 23, 1881, will show the court that two classes of machinery were built by the defendants for the plaintiff, namely, hydraulic machinery for pressing bark, and steam boilers and machinery for propelling the steamboat Tan Bark. As to the boilers and machinery for propelling the steamboat, the original guaranty that they should be made in a workmanlike manner and of first-class material, with sufficient capacity to do the required work, and guaranteed to pass government inspection, is not modified. As to the hydraulic machinery, which was intended for the pressure of bark into bales, all guaranties are withdrawn, except that relating to the strength of material, and as to that all guaranties are withdrawn except that it would bear 1,500 tons pressure, not for continuous work, but "up to" 1,500 tons, or without bursting upon test. Any other construction of the contract of March 30, 1882, eliminates this sentence from it. This sentence was added by the parties as the last expression of their purposes and designs. The words are not ill used; but carefully adapted to a plain end. They relate to the "*above* guaranty" covering hydraulic machinery, showing that the parties were discriminating between hydraulic machinery and the steam boilers and engines for propelling the boat, or steam machinery. The use of the word "only" twice

is also indicative, and the contract seems to us as plain as if it had said

"as to steam machinery all former agreements and guaranties are continued, and as to hydraulic machinery nothing is guaranteed except the strength of material, and that, only up to the 1,500 tons pressure."

To show how severely Judge Hammond's adverse view bore upon the defendants, and how entirely it eliminated from the case and from the contract of March 30, 1882, this sentence,

"It is hereby agreed that the above guaranty covering hydraulic machinery extends only to the strength of material only up to the 1,500 tons pressure."

we quote the following charges given and refused by him, and from the general charge:

The fifth charge given at the instance of the plaintiff, (Record, 41,) is:

"5th. The written contract, if the jury find it was made between the plaintiff and the defendant, requires the machinery to be made under it to be constructed in a workmanlike manner and of first-class materials and to be set up aboard the plaintiff's boat in Cincinnati, Ohio. The machinery is to have sufficient capacity to do the required work, and is guaranteed by the McGowan Pump Company. The contract, having thus defined the character of the work, it can not in that respect be varied by parol evidence, which is admissible only to enable us to properly interpret the contract. It requires the machinery to be constructed in a workmanlike manner and of first-class materials."

The sixth charge, (Record, 41,) given at the instance of the plaintiff, is:

"6th. The machinery being constructed to be set up on the plaintiff's boat, it is for the jury to determine what the boat was that was referred to, and if the boat intended was one provided to be constructed by James Mack of a kind, and of dimensions, and with bulk-heads of founda-

tions then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulk-heads so defined and understood by the parties for rendering machinery stable to do the required work when set up aboard the boat."

The seventh charge, (Record, 41, 42,) given at the instance of the plaintiff, is:

"7th. If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April 23 and July 5, 1883, then while the McGowan Pump Company did not guarantee that bark would bale, it did guarantee to furnish a practical machine set up on board of the boat that was capable in its design and in all its parts of being worked to apply 1,500 tons pressure to press a bale of bark every two and one-half minutes, or within a reasonable time, if the contract of March 30 be valid, and capable with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such mechanism constructed for similar uses."

The following charge, asked by the defendants, but refused by the court, (Record, 46):

"That the guaranty referred to in the contract of June 23, 1881, is a guaranty of the machinery to be made and not a guaranty as to its operation upon the boat which the plaintiff might present for that purpose to the defendants."

The twenty-eighth charge, (Record, 46,) asked by the defendants, but refused by the court:

"28th. If it appear in this case that the machinery contracted for in the contract of March 30, 1882, was not possible to be made as working machinery because the material of which it was to be made was not capable of sustaining any such working pressure, yet that the material used by the defendants was of the strength of 1,500 tons, then the con-

tract of the 30th March, 1882, must be construed as relating to the strength of the material and not to the working capacity of the machinery."

The following passages of the general charge, excepted to by the defendants, namely, (Record, 47):

"But if you find that within the range of mechanical art such pressure could have been delivered to the bark it was their obligation to do it. The whole field of mechanical engineering was open to them, except so far as it was restricted by the necessity of placing the machine upon a floating foundation to be furnished by the plaintiffs, of which more hereafter will be given you in charge. They were not restricted in plans, specifications, or materials, and were bound to select such plans and materials as were available and capable of doing the work. It was their misfortune if the price demanded was not sufficient to cover the cost; but that fact, if it be one, cannot relieve them. In short, they contracted as mechanical engineers and as manufacturers and are bound by the contract as they made it in this respect."

Also, (Record, 48):

"The machinery being contracted to be set up on the plaintiff's boat, it is for the jury to determine what the boat was that was referred to, and if the boat intended was the one provided to be constructed by one James Mack of a kind and dimensions and with bulk-heads or foundations then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulk-heads so defined and understood by the required work when set up aboard the boat."

Also, (Record, 48, 49):

"If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April 23 and July 5, 1881, then while the McGowan Pump Company did not guarantee that bark would bale, it did guarantee to furnish a practical machine, set up

on board of the boat, that was capable in its design and in all its parts of being worked to apply 1,500 tons pressure to press a bale of bark every two and one-half minutes, or within a reasonable time, if the contract of March 30th be valid, and capable, with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such machinery contracted for similar uses."

These charges show that although McGowan & Bliss had been relieved by the contract of March 30, 1882, from all guarantees relative to hydraulic machinery, except that relating to strength of material, and as to that only agreed that it would work "up to" the pressure of fifteen hundred tons, yet Judge Hammond held the contract broken unless the machinery had sufficient capacity to do the required work, was constructed in a workmanlike manner and of first class materials, (Plaintiff's fifth charge, Record, 41,) and would work efficiently, (Plaintiff's sixth charge, Record, 41,) capable of continuous operation for the ordinary duration of such mechanism constructed for similar uses," (Plaintiff's seventh charge, Record, 42,) able to deliver a pressure of 1,500 tons to the bark, and by which the plaintiff could compress each and every bale to the extent of 1,500 tons pressure for the length of time such a machine would work under prudent and reasonable management, (General charge, Record, 47, 48, 49). We submit that by the course thus taken the court induced the jury to exaggerate the damages of the plaintiff and led them to an unjust result.

IV.

The petition, (Record, 2 and 3,) shows that $7,200 still remains due, part of the original consideration, payable by the plaintiff to the defendants, upon performance of the contract of June 23, 1881. The answer shows, (Record 10,) that the same sum of $7,200 remains due under the contract of March 30, 1882. The bill of exceptions, as well as the petition, shows, (Record, 27,) that the entire amount paid by the plaintiff to the defendants, on the contracts between them, was $12,500, before March 30, 1882, and $4,000 after that date, (Record, 27). On page 30 of the record we find that the defendants offered proof that the plaintiff still owes them for their work, under the agreement of March 30, 1882, $8,731.68. This is evidently made up by adding the sums stated in the third and fourth counts of the answer, as due from the plaintiff to the defendants, namely, $7,200, on the contract of March 30, 1882, and $1,531.46 for work performed after the defendants had taken possession of the steamer "Tan Bark," in April, 1882. Under these circumstances the jury were instructed by the court, at the instance of the plaintiff, as follows, (Record, 41):

"4th. The jury are instructed, if they find for plaintiff, that they are not to make any deduction from the amount of damages which plaintiff is entitled to recover on account of any balance claimed to be due and unpaid on account of the contract made for said machinery or on account of any other contract, but they must return a verdict for plaintiff, if they so find, in such sum as will make plaintiff whole and compensate it for all losses and damages suffered by it as the direct result of defendants' breach of contract, and are not to make any deduction from said amount on account of any contract whatever."

Reference to the general charge, (Record, 66,) shows that the court adhered to this view in its general charge. The effect of this charge was to give, to the plaintiff, a money equivalent for the completion of the contract; to make it whole; to put it in the precise position it would have occupied had the contract been performed, except that instead of having a performed contract they have its money value in the shape of a judgment against the defendants, but without giving to the defendants, that, to which, if the contract had been performed or its money value paid, they would have been entitled, namely, the cost price of the boat. This we submit is at war with justice, at war with law, and in direct conflict with the authorities.

In *Steamboat Wellsville* v. *Geise*, 3 Ohio St. 333, it was settled that recoupment,

"even as enlarged in its meaning by modern usage, signifies nothing more than a reduction of damages."

Thus in an action brought by a common carrier for the transportation of property, damages to the property is a proper subject of recoupment, and proof of such damages upon a proper pleading may be given to reduce the plaintiff's claim.

To the same effect are:

Timmons v. *Dunn*, 4 Ohio St. 680.

Upton v. *Julian*, 7 Do., 95.

In an action upon a contract for the construction of a particular job of work or for the sale of goods, damages resulting from non-compliance with the contract, or a breach of warranty, are allowed, under proper pleadings, by way of recoupment of the plaintiff's claim for damages. The converse of this proposition is equally

true. In an action upon a warranty for goods sold, the unpaid residue of cost price may be recouped. This is not by way of set-off, but deduction from damages, and to avoid circuity of action. In an action for damages for non-performance of work according to contract, the unpaid *residuum* of the original contract price may be recouped upon like principles. It was held that the rule, by which courts are guided, in this class of cases, is not to allow the claim as a set-off, but as a reduction of damages, by Lord Wensleydale, (when Baron Parke,) in *Mondel* v. *Steele*, 8 M. & W. 858.

All the authorities are collected, and the principle stated correctly in 1 Sutherland on Damages, pages 261 to 272.

See also,

Dermott v. *Jones*, 2 Wall. 1, 9.

Railroad Company v. *Smith*, 21 Do., 255.

It remains only to consider whether the pleadings in this case justify the appeal to this court for reversal on this ground. No objection can be made to the reversal we ask, because of failure to plead a counter-claim as such, for the reason that, as already shown, the facts were all properly averred in the pleadings, and testimony was given of their truth, which is embodied in the bill of exceptions. The petition shows that $7,200 still remains due on the original contract. The answer shows that $7,200 remains due on the contract of March 30, 1882; and that items of subsequent work, done after March 30, 1882, are due, to the amount of $1,384.96+$146.50=$1,531.46.

The effect of the rule against which we are contending is to drive the defendants to an unnecessary cross action; to subject them thereby to the risk of the insolvency of the plaintiff, or to the necessity of an unnecessary ap-

plication for injunction, and to the danger of the possible inability of the plaintiff to respond to the judgment recovered in such cross action, while they remain liable on the judgment recovered in the present suit. This, we submit, makes the fourth charge, given at the instance of the plaintiff, unjust as well as in conflict with law.

V.

The eighteenth charge asked by the defendants, (Record, 45,) was in the following language:

18. "If the machinery contracted for in this case was in fact incapable of working up to the pressure of 1,500 tons, required by contracts between the parties, and this incapacity resulted not from any ——— of workmanship or construction, but from the fact that such machinery of the character and description provided for by said contract can not be made capable of working up to such pressure, and if the machinery was in fact made of first-class material and in a workmanlike manner, and was capable of receiving the greatest pressure machinery of the description called for by said contract could be made to work up to, then the fact that this said machinery will not work up to such pressure does not entitle the plaintiff to recover any damages based on such incapacity to work up to such pressure."

We submit that this instruction should have been given, for the reason that the damages to which the plaintiff is entitled in this case, if any, are not reached by estimating the cost of performing an impossible contract, but the loss of actual values. For this alone the defendants, in legal effect, contracted to make compensation. If the defendants contracted for that which, in fact, had no value, because its performance was an impossibility, then the plaintiff is entitled to no more than nominal damages. The plaintiff can not recover more than the advantages of

his bargain, such as they were. If it could not produce benefit to him, then his recovery should be purely nominal. The limitation of a recovery in this as in all other cases is to

"a just indemnity for actual injury. . . . Recovery beyond nominal damages requires that actual injury be shown. 1 Sutherland on Damages, 127."

See also *Adams Express Co.* v. *Egbert*, 36 Penna. St. 360.

The refusal of the court to give the following charge, asked by the defendants, (Record, 43,) seems to us to be erroneous:

"That even if it be true and believed by the jury from the testimony that the contract of March 30, 1882, was broken by the defendants by non-delivery of the receipts or of assignments of patent rights therein described, nevertheless such breach does not entitle the plaintiff to recover in this case upon the contract of June 23, 1881."

We were entitled to this charge for the reason that the supposed breach, referred to in it, went to the consideration of the contract of March 30, 1882, and while it might have entitled the plaintiff to claim partial failure of consideration of that contract, and to reduce the amount thereby payable to the defendants, nevertheless it could not have authorized him to rescind, and to recover as if that contract had not been made.

to override and alter the plain effect and precise stipulation of the contract of April 19, 1882, for cash payments.

Respectfully submitted,

GEO. HOADLY,
EDGAR M. JOHNSON,
EDWARD COLSTON,
GEO. HOADLY, JR.,
Of HOADLY, JOHNSON & COLSTON,
(With LINCOLN, STEPHENS & LINCOLN,)
Of Counsel for Plaintiff in Error.

CINCINNATI, O., *January* 4, 1887.

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Supreme Court of the United States

OCTOBER TERM, 1886.

THEODORE J. McGOWAN, ET AL.

Plaintiffs in Error.

vs.

The American Pressed Tan Bark Co.

Defendant in Error.

No. 168.

BRIEF FOR PLAINTIFFS IN ERROR.

T. D. Lincoln,
C. H. Stephens,
J. L. Lincoln,
Of Counsel for the Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM, 1886.

THEODORE J. McGOWAN, ET AL.

Plaintiffs in Error.

vs.

The American Pressed Tan Bark Co.

Defendant in Error.

No. 168.

In this case Judge Hoadly has filed a carefully prepared brief, presenting the pleadings, the facts of the case, the action of the Court, the errors assigned, and fully complying with the rule of the Court. I shall not enter into a discussion of all the questions involved in the record, but desire to make some suggestions as to several of the points.

I.

As to the question of partnership resulting from holding out, this rule of law is one based upon the doctrine of equitable estoppel or estoppel *in pais*, and we submit that the charge relating thereto was erroneous.

The following charges were given at the request of the plaintiff, to the giving of each of which the defendants excepted:

"1. If the jury find from the evidence that defendants, prior to the making of the contract of June 23d, 1881, held

themselves out to plaintiff as partners, and that plaintiff dealt with them as such prior to the making of said contract, and entered into said contract believing them to be a firm, and without notice of a corporation, then said defendants are liable on said contract, even though they should find that defendants were not, in fact, a firm, and that there was a corporation called the 'McGowan Pump Co.' *Rec.* 40.

"2. If the jury find, from the evidence, that the defendants were, prior to June 23d, 1881, doing business, as partners under the name of 'The McGowan Pump Company' or 'McGowan Pump Co.', and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability thereon, even if on that date a corporation existed called 'The McGowan Pump Company,' with which defendants may have been connected, and to which they had turned over their entire partnership business and assets." *Rec.* 40.

The facts proven relating to this matter are the following:

"They also gave evidence tending to prove that the defendants were partners under and signed the name of T. J. McGowan & Bliss and The McGowan Pump Company, and tending to show that at the time the contract of June 23d was signed, the defendants, upon being asked the reason for using the name of The McGowan Pump Company, said it was to retain the old name.

"They also gave evidence tending to show defendants had negotiated with plaintiff as a firm under the name of The McGowan Pump Company prior to June 23d, 1881, and that the defendants contracted with the plaintiff June 23d, 1881, as a firm under the name of The McGowan Pump Company, and that all the plaintiff's dealings with defendants were as such partnership." *Rec.* 26–7.

It does not appear here, *when* it was that the defendants negotiated with the plaintiff as a firm, or how the *defendants*

understood it. The plaintiffs may have had that impression, that the defendants were partners, and negotiated while having such impression, and the defendants not having it, or knowing that the plaintiffs were negotiating upon such an idea.

This evidence simply *tended* to prove these facts, and might have justified a charge, that if the jury found such facts as were set out in the charge, they should find for the plaintiff upon the fact. It could not go further.

Charge 1 thus quoted does not in any way set out when the plaintiff dealt with the defendants as partners, except that it was prior to the contract of June 23, 1881. It may have been fifteen or twenty years before, and such dealing may have wholly ceased that many years previously.

The same is true of charge 2.

But the error of the Court upon this point is more apparent from the overruling of charge 31 of the defendants, which is in these words:

"31. If the agent of the plaintiffs sent here to make contract for this work did contract with the McGowan Pump Company, and had it explained to him that the said company had organized as a corporation, and the defendants went on under said corporation and did the work provided for, which the plaintiff subsequently took from said corporation, they cannot now deny that they dealt with the said corporation." *Record* 46-7.

The authorities showing that the doctrine here attempted to be established, is that of estoppel *in pais*, are too well understood and the authorities are too numerous to require citation even.

In *Wood* v. *Pennell*, 51 Maine, the Court say, (p. 60):

"This limitation of the effect of estoppels *in pais* applies to partnership cases as well as to others. If one holds him-

self out to be a partner of another, that does not make him in fact a partner, nor render him liable as such, except to those who are thereby led to believe he is a partner, and who gave credit to the supposed firm upon such belief. The cases cited by the plaintiff clearly recognize this distinction." —p. 60.

Again the Court say, (p. 61):

"But there can never be a *general liability* as a partner *by estoppel*. Therefore the assertion of the doctrine, without limiting it to the persons who were induced by the acts or admissions to give credit to the supposed firm, was essentially erroneous. It was not correct as far as it went, only needing some other instructions, which may have been given, to state the whole truth. It was stating that to be true generally, which could not be true at all, except in some particular cases, which should have been specified."

The doctrine, as usually expressed, is found in *Copeland* v. *Copeland*, 28 Maine, p. 540. The Supreme Court of that state say:

"In this position, thus established, it must be observed that several things are essential to be made out in order to the operation of the rule; the first is, that the act or declaration of the person must be willful—that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation be untrue; and the other must appear to have changed his position by reason of such inducement."

Again the Court say: (p. 540.)

"In the first place it does not appear that, in the call for instructions, any regard was to be had to whether the conduct, acts and declarations of the defendant were done or

uttered with a design, or even with the knowledge that they could or would influence the conduct of the plaintiff; or that they were done or said with a design that they should come to his knowledge, or with any reason on the part of the defendant to suppose that they could or would influence the conduct of the plaintiff."

In the many cases which might be cited establishing this doctrine of partnership by "holding out," etc., there is not one where the essential element of an equitable estoppel was not present. In this respect the charge of Judge Hammond was erroneous, is evident.

There is no fair element of fraud practiced upon the plaintiff below, as set out in said charges; the facts set out therein are consistent with carelessness in not making inquiry, and do not express any such state of things as authorized the application of this doctrine of estoppel.

Bigelow gives a definition which pushes this doctrine as far as it has ever gone.

"An estoppel, by matter *in pais*, may be defined as an indisputable admission, arising from the circumstance that the party claiming the benefit of it, has, in good faith on his part, been induced by the voluntary intelligent action of the party against whom it is alleged, to change his position. And the parties may have been *equally innocent* in effecting this change of position, or they may not have been *equally innocent.*" (*Part III, Chap. XIV, Bigelow on Estoppel, p.* 369.)

It must be the voluntary *intelligent* action of the party which has caused him to change his position to his injury. Ordinarily, there must be something fraudulent in the action of the party estopped, certainly a clear, distinct statement made, upon which he knows that the other party will rely, and in reference to which the latter has no means of obtaining knowledge. Nothing stated in these charges shows that in

the matter in controversy the defendant below intentionally induced the plaintiff below to change his position to his injury. It was his neglect to inquire of the defendants whether the partnership still continued.

II.

The Circuit Court also erred in relation to the time within which the defendants were bound to complete the machinery.

The contract of the defendants related to machinery for the grinding and pressing of tan-bark to be placed upon a boat to be finished by the plaintiff, the same to be completed within sixty days; the contract was executed June 23rd, 1881.

The boat upon which this machinery was to be placed was, by the agreement of the parties, to be "finished and delivered afloat to the party of the second part on or before August 26th, 1861. *Record p.* 36.

The case clearly shows that the boat was not completed and ready for the machinery until November 10th, 1881.— *Record pp.* 29, 39, 40.

This was two and a half months after the time when the boat should have been ready by the agreement and understanding of the parties. This necessarily placed the building of the boat into the short and colder days of the year, when everything would have to be done at a great disadvantage as compared with the sixty days succeeding August 26th, when the said boat was to have been in readiness.

One of the principal questions made at the trial was this: The boat upon which the machinery was to be placed not being ready for the machinery as contemplated by the parties, and the plaintiffs having thereby broken their part of

the contract, what rule was to apply as to the time within which the defendants were to complete their part of the contract? Was it within sixty days after the boat was finished, or were the defendants entitled to a reasonable time thereafter?

The Court charged that the defendants were bound to complete the machinery within sixty days of the time when they received her, and were liable for damages if they did not do so; whereas the defendants contended that they were only bound to complete the boat within a reasonable time, which was to be determined in view of all the circumstances. The original time in which the vessel was to be finished having been eliminated from the contract, and no new time agreed upon, the parties proceeding therewith were entitled to a reasonable time.

This question is very clearly made in charge fourteen asked by the plaintiff. *Record page* 42.

The Court charged:

" * * * that the boat was not then in readiness to receive it (the machinery); yet if the said boat was thereafter made ready by James Mack, and the defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement, and such additional time as may have been lost in the prosecution of the work, occasioned by Mack's delay in the construction of the boat, and failing in this they are liable for the consequences of such failure and delay.

In the general charge, the Court used the same language (*Record page* 48). Exception was taken to the giving of the special charge and to the part of the general charge relating thereto.

The error will more clearly appear from the action of the Court in overruling charge four asked by the defendants

reasonable time to complete the work. The Court say, at page 543:

"It seems that had there been no delay under the contract, as it was written, appellants would have had about seven weeks in which to complete their part of the work, and that it was all the time that could be reasonably insisted upon is apparent, as one of them stated, when the contract was made, they could do it in thirty days."

The question here raised did not arise in that case, nor did it in the case of *Phillips & C. C. Co.* v. *Seymour et al*, 91 U. S., 646. These cases are entirely consistent with our view of the case now under consideration.

III.

The next point to which I will advert is the right of the plaintiff below to sue and recover upon the agreement of June 23rd, 1881. The defendants below contended that the agreement existing between the parties and upon which their rights depended, was the agreement of March 30th, 1882. The agreement of June 23rd, 1881, consists of correspondence between the parties, which is in the following language:

"CINCINNATI, O., *June 23d*, 1881.

The Am'r Pressed Tan-Bark Co., of 240 *Broadway, New York:*

GENTLEMEN:—We hereby propose to furnish you the following machinery:

1. 14" x 24" engine and all necessary trimmings for grinding bark.

2. 14" x 28" engine and all necessary trimmings for propelling boat.

3. 3 boilers, 42" x 26" and all necessary trimmings for propelling boat.

3 bark mills and all necessary trimmings and gearing.

1 bark elevator; 2 elevators with platforms for raising

and lowering pressed bark to and from hold of boats, to be provided with safety catches and unwinding device; 3 heaters—1 for bark engines, 1 for boat engines, and 1 for steam pumps; 1 steam-pump for boiler feed, 1 deck hand pump; 250 feet of rubber-hose, couplings, and 3 nozzles; 2 hoppers and scales to weigh bark; all the necessary shafting, hangers, pulleys, beltings, and all steam and escape pipes; also 1 20" hyd. press and two 12" hyd. presses with their necessary fixtures and connections, together with the necessary hyd. steam-pumps, tank, &c., for pressing bark into bales; all to be done in a workmanlike manner, and of first-class material, and set up aboard your boat in Cincinnati, Ohio, for the sum of twenty three thousand seven hundred ($23,700.00) dollars, the above machinery to have a sufficient capacity to do the required work, and guaranteed *and* to pass Government inspection.

[Signed] THE McGOWAN PUMP CO.

To be completed in 60 days.

We accept the above

Accepted June 23, 1881.

[Signed] AM'R TAN-BARK CO.,
By S. W. Beach, Att'y."

It will be seen that this letter gives no other idea of the strength of the presses than that the machinery should "have a sufficient capacity to do the required work," and should "pass Government inspection."

On June 30th, the plaintiff below wrote to the defendants, saying: "We understand that the capacity of the presses, etc., are in keeping with guarantee expressed in your letter of April 23rd, 1881, which we consider a part of your contract insofar as guarantee of the presses are concerned." *Record p.* 32. To which defendants below replied: "Our contract is in accord with ours of April 23rd." *Record p.* 32.

They also speak of the whole being an untried experiment, as the evidence shows it to have been.

The letter of the 23rd of April, 1881, contains a plan, views, etc. of the presses, which, it is stated, "were gotten up in great haste and are not as full as they should be, but they show what our ideas are." The whole letter is an explanation of this hasty plan, and there is nothing in it about the power or strength of presses, except this at the end of the letter: "20" press can be used up to 1,500 tons pressure." (*Record p.* 33). Here is no guaranty, but simply an expression of a hasty opinion, then understood to be such, and the defendants below simply say in this letter, for which there was no new consideration whatsoever, that their previously executed contract was in accord with that letter. There was no formal guaranty, nor any consideration for any, but an expression of an opinion that the contract entered into seven days previously was in accord with that letter. The contract had been fully executed and these letters could not change it. They were no part of the contract. There is no fair ground for an argument that there was any binding contract that the machinery could be continuously worked up to 1500 tons pressure.

But irrespective of this, the contract subsequently entered into, displaced the prior contract, and the terms of this contract are more guarded. It is in these words:

"CIN'TI, O., *M'ch* 30, 1882.

In consideration of $11,200.00, to be paid, we hereby transfer to the American Pressed Tan Bark Company of New York all the machinery embodied in our contract and extras, with receipt in full for all material and machinery furnished T. J. McGowan & Bliss by the parties for steamer "Tan-Bark". The terms of this sale are as follows: To continue all former agreements and guarantees except time required to press bark into bales and removal from cylinders. We further agree to transfer to said Co. all special patterns made for our

hyd. machinery, and also agree to transfer to the said Co. our exclusive interest in the accumulator and double-end arrangement on hyd. press for bark purposes only.

It is hereby agreed that the above guarantee covering hyd. machinery extends only to *the strength of material* only up to the 1,500 tons pressure. We hereby acknowledge receipt of four thousand ($4,000.00) dollars balance, to be paid on presentation of receipts as above.

THE MCGOWAN PUMP CO.
AM'N PRESSED TAN BARK CO.,
By S. H. Beach, Att'y."

The Court will bear in mind that this whole thing was an experiment; gotten up, as we believe, to enable the parties to make a profitable sale of a patent, for one of those monstrosities of which there are so many under our patent system *as administered.*

In this contract, they adopt as a part of it all former agreements and guarantees, except time required to press bark into bales and removal from cylinders; but they follow this by the following language:

"It is here agreed that the above guaranty, etc., extends only to the strength of the material only up to 1,500 tons pressure."

As Judge Hoadly has remarked, the use of the word *only* twice was intentional, to limit the extreme strength of the material. This is a contract binding according to its fair construction, I admit. There was a new and sufficient consideration for it from both parties. The plaintiff below gave up their old contract, took the machinery then constructed with the extras at a given price, bargained for certain patents, and limited the extreme strength, *not of the machinery*, but of the *material* of which it was built. The Court will observe that the *working strength of the machinery* was not spoken of.

As throwing light upon this question, let us look at the facts stated in the record:

"The plaintiffs offered evidence of experts tending to show that the machinery and material of which it was constructed, was poor and insufficient to sustain the required pressure; and upon cross-examination upon this point, the said witnesses gave evidence tending to show that a single hydraulic cylinder could not be made of cast iron so (as) to bear 1,500 tons pressure."

"The defendants also gave evidence tending to show that the machinery for pressing of the bark was constructed of the very best cast iron, and that that was the only material of which said machinery is ever constructed; that the same was of the very highest and best character, and that the workmen upon it and the workmanship were of the highest and best character, and that they endeavored in every way they could to make this machinery as strong and as well as it could be made." *Rec., p.* 50.

All this tends to show that the parties could not have intended that the 1,500 tons were to be a continuous working pressure. The Court will not here forget that the whole thing was an untried experiment, and that prior to this contract of March 23, 1882, the plaintiff below had taken possession of the machinery as constructed and knew all about it. *Record, page* 30. They had their experts here to examine it, and it had been tested only up to 800 or 1,000 tons. *Record, page* 28.

The Court will not presume that they would contract for a thing impossible by the physical laws of nature.

But this evidence is more important as bearing upon charge 18, asked by the defendants below, which was in these words:

"If the machinery contracted for in this case was in fact incapable of working up to the pressure of 1,500 tons,

required by contracts between the parties, and this capacity resulted not from any—of workmanship or construction, but from the fact that such machinery of the character and description provided for by said contracts cannot be made capable of working up to such pressure; and if the machinery was in fact of first-class material and in a workman-like manner, and was capable of receiving the greatest pressure machinery of the description called for by said contract could be made to work up to, then the fact that this said machinery will not work up to such pressure does not entitle the plaintiff to recover and damages based on such incapacity to work up to such pressure." *Record, page* 45.

IV.

The Court erred in refusing to give charge No. 24, which is in these words:

"If the plaintiff knew that the defendants had no knowledge of boats or boat-building, and in the negotiations relating to the contract of June 23rd, 1881, refused to take any responsibility in relation to the boat, and informed the plaintiff that they had no knowledge of boats or boat-building, and would take no responsibility as to the boat except to communicate between them and Mack, then the said contract cannot be held to make the defendants in any way responsible for the sufficiency of the boat or its foundations for the successful operation of the said machinery." *Record p.* 46.

This charge has reference to the following evidence:

"The defendants offered evidence tending to show that they were not boat-builders, had no knowledge of boats or of boat-building, as the plaintiff knew, and that defendants refused to take any responsibility about the boat and had nothing to do with planning, constructing, supervising, accepting, or controling it or its foundations; that they supposed Mr. Mack would attend to that; that the boat was not

launched or presented for the machinery until November, 1881; that they supposed that when they commenced to put the machinery upon it that it would be sufficiently strong; that the foundation, as they proceeded, proved wholly insufficient for that purpose, being too weak; that they reported it to the plaintiff's agents; that he said to them to go ahead and put it on and he would guarantee that they would stand; that the defects in the boat and the bad management of the machinery by the plaintiffs caused all the difficulty and breakage in the machinery, and all the expense in repairing; and in addition thereto the defendants also offered proof tending to show that the boat was not ready for their work until about the 10th of November, 1881, and that they used due diligence in the manufacture of the machinery and in putting it upon the boat, and that the delay therein was due to the delay in finishing the boat and in the character of the boat when presented for the machinery to be put upon the same." *Record pp.* 29, 30.

Here was evidence which authorized the charge asked and we insist that the Court should have given it.

The Court, in the general charge, went still further upon this subject, and charged as follows:

"But if you find that within the range of mechanical art such pressure could have been delivered to the bark it was their obligation to do it. The whole field of mechanical engineering was open to them, except so far as it was restricted by the necessity of placing the machine upon a floating foundation to be furnished by the plaintiffs, of which more hereafter will be given you in charge. They were not restricted in plans, specifications, or materials, and were bound to select such plans and materials as were available and capable of doing the work. It was their misfortune if the price demanded was not sufficient to cover the cost; but that fact, if it be one, cannot relieve them. In short, they contracted as mechanical engineers and as manufacturers and are

bound by the contract as they made it in this respect." *Record p.* 47.

This was excepted to. There was nothing in the case that authorized such a charge.

The Court followed this up by the following, in its general charge:

"The defendants claim that its proper construction requires that 1,500 tons only applies to strength of material to endure that pressure as a maximum of endurance, not for a continuous working pressure. It belonged to the plaintiff to say what it wanted and to defendants to consider it when they made the contract whether they could give that which was wanted. There is no proof tending to show that the proper construction is that the plaintiff only wanted a machine of sufficient strength to endure a test of 1,500 tons; but, on the contrary, read in the light of the circumstances proved, the language of the contract clearly means that the plantiff wanted a machine by which they could deliver on each and every bale a compression of 1,500 tons if they chose so to use it, and which would endure the work for the length of time such a machine would wear under prudent and reasonable management by the plaintiff." *Record p.* 48.

What is there in the case that authorized such a charge.

But there *was* proof tending to show that the proper construction is that the plaintiff only wanted a machine of sufficient strength to endure a test of 1,500 tons. It lies in the indefinite expression found in the contract of June 23rd, 1881, in the more guarded words contained in the contract of March 30th, 1882, and in the proof that no machine could be made to be safely worked with that pressure and that the parties could be held to wish to do that which was physically impossible.

What right had the Court to say "that, read in the light of the circumstances proved, the language of the contract

clearly showed that the plaintiffs wanted a machine by which they could deliver upon each and every bale a compression of 1,500 tons, if they so chose to use it, and which would endure the work for the length of time such a machine would wear under prudent and reasonable management of the plaintiffs." All this is pure assumption, and a wrongful construction of the facts before referred to, for they were all the evidence there was upon the subject, and we contend that they strongly tend to prove the contrary of what is thus assumed by the Court. It was also encroaching upon the province of the jury.

V.

The Court was also asked to charge as follows:

"That if, in March and April, 1882, the plaintiff took into its possession and control the machinery built and set up on its boat by the defendants under the contract of June 23d, 1881; and afterwards, for the purpose of making the same more efficient and useful, entered into the contract of April 19th, 1882, with the defendants, and the defendants furnished the labor and delivered the materials provided for by said contract of April 19th, 1882, and the plaintiff received the same and appropriated it to its own use, then and thereby the plaintiff waived all claim for damages for any defects in said machinery which were corrected or relieved by the execution of the contract of April 19th, 1882, or by the labor and materials furnished under it, but, on the contrary, *are* liable to pay the defendants for said labor and materials at the prices fixed by said contract of April 19th, 1882." *Record, p.* 44.

The record shows that prior to March 30, 1882, the defendants in error had had full opportunity to examine the work done by the plaintiffs in error (see *Record, pp.* 27, 28,

30), and that the machinery had been tested, and the agreement of that date embracing new considerations, transferred to defendants in error. This must be considered a full and complete settlement of the matters between them upon the terms of that agreement to that date. The guarantees to be continued, related to the steamboat machinery and the general workmanship, and did not provide for the continuous working pressure which the machinery would bear.

If that could have been implied from the contract of June 23, 1881, It was for a valuable consideration modified in the agreement of March 30, 1882. It distinctly provides, not for the strength of *the machinery*, but for the strength of the *material* of which it should be made:—two things quite different.

This agreement of the 19th of April shows that at that time the parties were not in dispute. The defendant in error would hardly have agreed, in the unconditional manner set out in this last agreement, for work that the plaintiffs had performed, that was in any way defective. From the time that all had been transferred to them by the agreement of March 30, they had had possession for twenty days when this agreement of April 19th was entered into.

The following evidence was before the Court and jury relating to this matter:

"They also offered proof tending to show that in March and April, 1882, the plaintiff took possession and control of said machinery, and that it was built and set up on its boat by the defendants under the contract of June 23rd, 1881, and afterwards, to make it more perfect, effectual, and useful, entered in the contract of April 19th, 1882, with the defendants, and the defendants furnished the labor and the material provided for in said contract and that the plaintiff used it on their said boat." *Record p.* 30.

The contract of April 19th, 1882, above referred to, is in the following words:

"Memorandum of agreement made this 19th day of April, 1882, by and between the McGowan Pump Company, of Cin'ti, O., and the American Pressed Tan Bark Co., of New York, as follows:

Said Pump Co. agree to furnish all the wrought and cast iron work to be used in making certain alterations to machinery on the boat 'Tan Bark,' now in possession of the said American Pressed Tan Bark Co., as hereinafter described and at the following prices:

Cast iron of the following:

1st. Main support for presses and carriage.

2nd. Carriage and wheels.

3rd. Kam heads to be put on.

4th. Bark pistons to be furnished with heads or renewed at option of American Pressed Tan Bark Co.

5th. New hanging piston from head block.

6th. Guides to bark cylinders.

All to be furnished and delivered in their shop at 6c. per pound.

Also the following wrought-iron work: The plates, angle-irons, coach-screws, and rivets for foundations under presses, all to be finished as directed and delivered at their shop at the rate of 6½c. per pound.

All of the above work to be made in accordance with the plans and specifications as furnished by Mr. Kemplin and under his supervision; work to be begun at once and to be completed within twenty days, unavoidable delay in obtaining castings and drawings excepted. The work to be done in a good and workmanlike manner to the satisfaction of Mr. Kemplin. Payments to be made in cash on completion of contract.

[Signed[T. J. McGowan, *Pres't.* [Seal.]
American Pressed Tan Bark Co.,
By S. H. Beach. [Seal.]"

VI.

The Court below also erred in admitting the evidence of damages, of the witness Kemplin, as to steamboat machinery. The record shows that :

"The plaintiff also examined one Kemplin, who resided in Chicago, and who was on board of the boat during the trip from Cincinnati to Paducah, and who testified that he was a hydraulic engineer, and had been engaged in the construction of steam engines and other machinery for many years, but had never built any steam engines to be used on the western rivers ; that on the said trip he had seen the propelling machinery in operation, and had examined it during the trip, and he was asked what the value of propelling engines for such a boat would be, and what it would cost to make such propelling machinery good; to which the defendants objected on the ground that the witness was not competent to prove such facts; and the objection was overruled, and the defendants excepted thereto, and their exception was allowed. Witness answered that the propelling machinery for the boat would have to be worth, if constructed according to contract, $3,500, and that on the boat was worth about $300.00, a difference of $3,200 ; to which testimony the defendants objected, and their objection was overruled; to which overruling the defendants excepted, and their evidence was allowed."

We contend that this testimony was incompetent for the reason that Kemplin was not competent to testify upon the point. He had never built any river steamboat machinery, and knew nothing of it, at least it does not appear that he had.

All of which is respectfully submitted.

T. D. Lincoln,
C. H. Stephens,
J. L. Lincoln,
Of Counsel for the Plaintiffs in Error.

121-570

SUPREME COURT U.S.
FILED.
JAN 27 1887
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers, Cincinnati.] [January, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

Thomas J. McGowan and Robert C. Bliss, Partners under the Firm Name of the McGowan Pump Company,

Plaintiffs in Error,

No. 168.] *vs.*

The American Pressed Tan Bark Company,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

THOS. McDOUGALL,
E. W. KITTREDGE,
For Defendant in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The action was for breach of contract to construct certain machinery for compressing tan-bark, and for the motive power of the steamboat upon which the compress was to be used. The allegation in respect to the contract and breach was, that the work should be done within sixty days from the date of the contract, the 23d day of June, 1881, and that the defendants guaranteed that the machinery should be constructed in a workmanlike manner, and should have a sufficient capacity to do, and would do the required work, and would pass government inspection; and

that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, and that the time necessary for the compressing and delivery of each bale of bark would be two and one-half minutes. The breaches alleged were that the contract was not performed within the time, and the machinery was not in accordance with the guaranty. Special damage was averred as resulting from the loss of a large quantity of tan-bark belonging to the plaintiff, which it was alleged, was occasioned by the delay in the performance of the contract.

The original answer, (Rec. 6,) by a general denial put in issue the execution of the contract and the breach of it as alleged by the plaintiff. On the 3d of April, 1883, (Rec. 8,) the jury was sworn and the trial of the cause commenced. After the trial had progressed for two days, the defendants obtained leave to file an amendment to their answer (Rec. 9). This answer contained three special defenses: First, that the contract as originally entered into contained no guaranty, and averring that if by subsequent modifications the provisions providing for the guaranty were added to and became part of this contract, that these modifications were wholly without consideration. Second, that by a contract dated March 30, 1882, which was set out in full, (Rec. 10,) defendant was wholly released and discharged from the obligations of the original agreement, as set out in the petition. Third, that the plaintiff received the machinery, and subsequently contracted with the McGowan Pump Company for changes and alterations there in, and thereby waived any claim for further performance of the original contract.

To this answer a reply was filed, denying the allegations of new matter and alleging that the contract of March 30th was obtained by fraudulent representations set forth in

the reply, and was therefore void, and was thereafter abandoned by the parties. This amendment to the answer and the reply were filed instanter by leave of the court; and the trial proceeded during five weeks from its commencement, and on the 8th of May resulted in a verdict for the plaintiff. Motion for a new trial was overruled, and judgment rendered upon the verdict. Plaintiffs in error presented their bill of exceptions, which was signed and made part of the record. For whatever defects there may be, either in the manner or matter of the case, as stated in the bill of exceptions, the defendant in error is not responsible.

By the bill of exceptions it appears that the plaintiffs in error submitted thirty-five special charges, which they asked to have given to the jury. Thirteen of these were given by the court (Rec. 69, 70). The remaining twenty-two were refused (Rec. 43). Plaintiff below submitted fourteen special charges, nine of which as modified by the court were given (Rec. 40). The charge of the court, which is quite elaborate, is set out in full in the record (Rec. 49).

ARGUMENT.

The errors complained of in the argument of plaintiff's counsel relate to the charges given at the request of the plaintiff below, to the statements of the general charge, and to the refusal to charge as requested by the defendant below. Several of the charges of the defendant below were statements of the same proposition in different forms, which proposition was given by the court in its own language in its general charge to the jury. The plaintiff in error classifies the errors for the purpose of argument: First, those relating to the question whether defendants below, under

the firm name of The McGowan Pump Company, entered into the contract sued upon, or whether it was a contract made by a corporation known as The McGowan Pump Company; second, error in relation to the non-performance of the contract within the time stipulated (sixty days) in the contract; third, errors in the construction of the subsequent contract of March 30, 1882; fourth, error in not permitting the plaintiff in error to recoup the amount claimed to be due, upon several grounds, from the plaintiff below to defendant below; fifth, that the court erred in its construction of and the effect to be given to the contract sued upon; sixth, that the defendants below were not permitted to recoup the amount claimed to be due them on the contract offered in evidence, dated April 19, 1882.

It is necessary to an understanding of each of these classes of error assigned, to present to this court the state of the pleadings upon the subject, and what evidence the record shows was received in reference to which the charges were given and refused that are made the subject of complaint.

I.

As to the question whether the defendants below as partners under the name of The McGowan Pump Company entered into the contract sued upon. This issue arose upon the general denial contained in the answer that the defendants entered into the contract sued upon. Upon this subject the bill of exceptions showed that the plaintiffs below offered a large mass of correspondence bearing upon the question (Rec. 26). They also

"gave evidence tending to prove that the defendants were partners under and signed the name of T. J. McGowan &

Bliss, and The McGowan Pump Company, and tending to show that at the time the contract of June 23d was signed, the defendant upon being asked the reason for using the name of The McGowan Pump Company, said it was to retain the old name, and tending to show that the defendant had negotiated with the plaintiff as a firm under the name of The McGowan Pump Company prior to June 23, 1881, and that the defendants contracted with the plaintiff, June 23, 1881, as a firm under the name of The McGowan Pump Company, and that all the plaintiff's dealings with the defendants were as such partnership."

The testimony recited, as offered by the defendants on this subject, is as follows (Rec. 30):

"They also gave evidence tending to show that The McGowan Pump Company was a corporation at the time of entering into the contract of June 23, 1881, and was so acting in making the contract, and that the plaintiff was so informed of it before the signing of the contract."

This is the record with reference to which the action of the court in charging, and refusing to charge, upon this point is to be considered.

The plaintiff below asked for two charges: first and second,—bearing upon this subject (Rec. 40.) The general charge of the court on this subject may be found Rec. pp. 51 to 55. It was one of the most litigated questions at the trial in the court below and the evidence offered in regard to it was properly referred to by the court as "voluminous," and called upon the court for the extended and careful statement of the law applicable to it, contained in the portion of the general charge referred to. The refusals to charge on this subject, of which the plaintiffs in error complain, (Brief 14,) are as follows:

"If The McGowan Pump Company, which entered into the contract of June 23, 1881, was in fact an incorporated company and not a partnership, then the plaintiff can not

recover in this case, whether the plaintiff supposed it to be a partnership or not."

And

(Charge 31): "If the agent of the plaintiffs sent here to make contracts for this work did contract with The McGowan Pump Company, and had it explained to him that the said company had organized as a corporation, and the defendants went on under said corporation and did the work provided for, which the plaintiff subsequently took from said corporation, they can not now deny that they dealt with the said corporation."

As to the second of these charges it contains as part of the recital as the basis for it:

"If . . . the defendants went on under said corporation, and did the work provided for, which plaintiffs subsequently took from said corporation, they can not now deny that they dealt with the said corporation."

It will be seen that this record does not show, and there was not in fact any evidence before the jury tending to show the facts to be as stated in this charge which rendered its refusal inevitable. It is this charge which the plaintiff in error refers to upon page 16 of his brief, by stating that "the refusal of the court to give it was wholly inexcusable, and had a serious tendency to mislead the jury." And this is said in view of the fact that the general charge upon this subject the argument does not complain of, and therefore concedes contained a correct statement of the law. It seems to us on the contrary that it would have been wholly inexcusable for the court to have delivered a charge based upon the recitals to a very material part of the facts to be found by the jury, and of which there was not the slightest evidence before the jury tending to estab-

lish them as the facts of the case. The court did charge, (Rec. 51–2,) that if the jury found that

"Theodore J. McGowan, president, and Robert C. Bliss . . . . made the contract of June 23, 1881, in the name of The McGowan Pump Company, and informed the agent of plaintiff at the time that the McGowan Pump Company was a corporation, and was contracting in that capacity, then the defendants are entitled to a verdict."

And upon the question of the authority of this agent so to contract, (Rec. 52):

"Wherefore if you find that notwithstanding this want of authority the defendants assumed in their corporate capacity to contract with the plaintiffs and notified Beach, (the plaintiff's agent,) that they were so assuming to act, or he otherwise knew it, your verdict must be for the defendants, irrespective of any want of authority."

And again, as covering both of these propositions asked by the defendant below and refused, the court in the general charge on page 51, did charge:

"If the jury find that on the 23d of June, 1881, there was in existence a corporation called The McGowan Pump Company, qualified to do business, and that when the contract of that date was signed in that name, that the defendants were authorized to act for it, and informed Beach that it was that corporation making the contract, the verdict must be for the defendant, because the corporation is not here sued."

This would seem to dispose of the objection, so far as the refusal of the court to charge as requested, and the general charge as given upon this subject goes. But the special charges asked by the plaintiff and given are criticised because they did not specify any limit of time prior to the making of the contract of June 23, 1881, at which,

or during which, the holding out of the defendants to the plaintiff as partners, and the dealing of the plaintiff with them as such, would have the effect in the absence of notice of the change of the firm or the partners into the corporation, to fix the liability of the defendants as partners. It is said that there had been no prior dealings whatever between the plaintiff and the defendant, and that the bill of exceptions does not profess to state any. We have to say that this bill of exceptions, not only does not profess to state all the testimony produced to the court below: it professes to state but very little of it, and in order to make such a criticism pertinent, it must appear, as it certainly does not, that no such dealings prior to the execution of this contract were had between the parties. There is certainly ample proof *tending* to show that such dealings had been had, in the correspondence. Thus in the letter of The McGowan Pump Company of March 15, 1882, (Rec. 39,) addressed to A. G. Darwin, the president of the Tan Bark Company, and the letter of May 8, 1881 (Rec. 39). There can be no such question before the court upon this record as that propounded by the plaintiff's argument (Brief, 16).

But it is said that the charges fix no period or limit of time prior to the making of the contract of June 23, 1881, within which dealings between the parties must have taken place, and that to make the charge good law it must have stated that it was "shortly prior." We do not so understand the law, but this charge must be read with reference to the case, and the evidence upon which it was given, and it not only does not appear that the "dealing" and "holding out" that were referred to were not "shortly prior" to June 23d, but so far as the record discloses they were "shortly prior" to that date—all of them at least within a year of that time.

Counsel for plaintiffs in error refer in their brief (p. 12) to a case pending in the Circuit Court between the corporation called The McGowan Pump Co. and defendants in error, and make statements concerning the time of bringing that suit and its subject-matter.

They state that suit was entered prior to the case at bar; they might have added that in the petition in that case filed before this case was begun it was, among other things, stated that

"Theodore J. McGowan and Robert C. Bliss, then doing business as partners, etc., made the contract with defendants in error," sued on in this case.

The question at issue was, with whom was the contract made, and not "was there a corporation known as The McGowan Pump Company at the date of this contract?"

The jury, under proper instructions, found the fact to be as claimed by defendant in error, and there is nothing in this record to show that that finding is incorrect, or is in a position to be reviewed by this court.

In conclusion on this point, we agree with the plaintiffs in error, (Brief, 17,) that "if the plaintiff's agent sent to contract for the work, did in fact knowingly contract with the corporation, and if the defendants did the work as a corporation, the attempt to hold defendants liable as a partnership" would be "a mere impertinence." But it would be something more than a mere impertinence to suggest to this court that any thing of the kind was done at the trial of this cause, or that the charge of the court permitted the jury to do any thing of this kind.

II.

As to the second class of errors complained of, viz: those arising upon the allegation that the defendant did not perform within the time set forth in said contract, and as to what constituted the breach of this provision of the contract, and what consequences should result from such a breach. The bill of exceptions, (Rec. 27,) recites that the plaintiff below

> "gave evidence tending to show that the machinery named in the said contract of June 23, 1881, was not completely finished and put upon said boat within the sixty days named in said contract, nor for a long time thereafter. . . . that in consequence thereof they suffered great delay in the use of said boat and machinery, and great damage in having to expend a large sum of money upon the same, and that the plaintiff lost a very large sum of money by the breach of said contract before it (the machinery) was finished."

The allegation in the petition of special damage relates to the loss of tan-bark occasioned by the delay. *The bill of exceptions does not recite that any evidence tending to establish this special damage was offered at the trial of the case.* It may doubtless be inferred from the general charge of the court upon the subject of damages and the effect of the delay, (Rec. 63,) that such testimony was offered, but the reason of the failure of the bill of exceptions to recite it, or what it tended to establish, is also made evident by the general charge in which the court, without quoting it at length, told the jury in substance that the alleged delay in the performance of the contract was of no significance in the case and could not be made the basis of any recovery of damages by the plaintiff below. As no damage under

the general charge was or could be included in the verdict on account of the alleged delay in the performance of the contract, the argument of the plaintiff in error proceeds wholly upon the ground that the petition having alleged that the plaintiff below had wholly performed the parts of the contract on its part to be performed, that the court below erred in refusing to grant the motion to arrest the judgment upon the ground that the defendants below gave evidence *tending* to show that the boat was not launched or presented for the machinery until after the expiration of sixty days from the date of the contract, and that the delay in putting the machinery into or upon the boat was occasioned by this delay in the completion of the boat. Surely we need not argue that upon a mere statement of the *tendency* of the evidence upon this subject, it can not be urged that the court below erred in refusing to grant a motion in arrest of judgment. No charge was asked, or refusal to charge is complained of, based upon the idea that if the jury *found* that the plaintiff below had failed to furnish a boat within the required time it would preclude its right to recover upon the cause of action stated in the petition. The charges asked by the plaintiff in error all turned upon the proposition that the consequence of such delay, parties on both sides having thereafter proceeded in the performance of the contract, was simply to change the time of performance to a reasonable time and to preclude the recovery of damages on account of any delay that was proved. As we have already said, the court, in substance, told the jury that they could not give damages on account of such delay, and the whole subject, therefore, so far as this record is concerned, drops out of the case. But while the language of the court below in its charge did not adopt the phraseology contained in the special charges upon this

subject submitted by the defendant below, in which it is stated that the performance in such a case must be at a reasonable time, we claim that the court correctly stated the rule upon this subject by including in its charge a statement of the rule as to what would constitute a reasonable time. The general charge upon this subject was substantially in the language of the fourteenth charge as given at the request of the plaintiff below, and it is this portion of the general charge which the plaintiff in error cites as containing an erroneous statement of the law. It is as follows, being stated in its proper connection upon page 63 of the record; and for the purpose of the exception of the defendant below at page 48, as cited in the plaintiff's brief:

"If the jury find the contract was made, as alleged, with the defendants, and that after the day named for the completion of the contract, the work not being then completed, that the boat was not then in readiness to receive it, yet if the boat was thereafter made ready by Mr. Mack, and the defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement and such additional time as may have been lost in the prosecution of the work occasioned by Mack's delay in the construction of the boat, and failing in this they are liable for the consequences of such failure and delay. Therefore the court charges you that the defendants are only liable for any damage caused by the delay for the period of delay found by application of the above rule to the proof in this case."

The particular language of the charge as given was taken by the court below from the case of *Graveson* v. *Tobey*, 75 Ill. 540.

In this case, on page 542, the court say:

"There is no question but the work was done under the contract, and was so understood by both parties, as they both acted under it as though it was in full force, except as to the time in which it was to be performed. Both par-

ties seem to have waived the delay occasioned by the contractor for the iron work. Appellants did not claim that they were released by the delay, but as soon as the building was ready they entered upon and performed the work as required by the contract, claimed payment under and according to the contract, and finally instituted this proceeding under it; and hence we must, from the action of the parties themselves, conclude that they regarded it as in force and binding in all things, except as to the time when the building should be completed. This being true, then appellants were bound in all things else to perform their part of the agreement, and on failing to do so, respond in damages sustained by its breach. When they commenced work they were bound to do their work in connection with the contract work, and so that there should be no delay on account of their part of the work. And they were bound to perform it within the same length of time contemplated by the original agreement, and failing in this they are liable. Had their work been inferior in materials or skill, and injury had resulted, no one would doubt appellant's liability therefor. So that, in any point of view, we must hold that the terms of the contract must govern."

See also Sutherland on Damages, vol. 2, page 523.

Western N. R. R. Co. v. *Smith*, 75 Ill. 496.

The law being correctly stated in the foregoing case, it seems clear to us that the work of the plaintiffs in error being inferior in material and skill, and injury having resulted to the defendants in error, no one can doubt plaintiffs in error's liability therefor. Plaintiffs in error did not claim that the contract was rescinded, or that they were prevented from complying with their part of the contract by reason of said alleged delay. It is not pleaded by them as a defense: no evidence was introduced by them to that effect. And it seems clear on the rule, as stated under the circumstances of this case, that plaintiffs in error can not escape liability for their breach of the contract by reason of the alleged delay in furnishing the boat.

In the case of *Phillips & Colby Construction Company* v. *Seymour et al.*, 91 U. S. 646, this court say, on page 650:

"The main proposition, underlying the whole argument of the defense on the general merits, is, that these covenants to complete certain sections within a definite time, and the covenant to pay, are mutual and dependent covenants; and that time is so far of the essence of this covenant of plaintiffs, that they can recover nothing, because they completed nothing within the specified time.

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the rule, that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other. There is no doubt that in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform, or tender performance first, must do it on that day, or show his readiness or willingness to do it, or he can not recover in an action at law for non-performance by the other party.

"But both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and his labor become combined and affixed to the soil, or mixed with material and money of the owner, often afford examples at law. . . .

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole, or any specific part of the building or structure, within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor can not recover on the covenant, because he can not make or prove the necessary allegation of performance on his part. What remedy he may have in assumpsit for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, "I prefer you should finish your work," or should

impliedly say so, by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work."

In the case at bar defendants in error have paid to plaintiffs in error a large portion of the contract price for this machinery, while the plaintiffs in error proceeded and erected machinery on the boat without a single complaint of delay in the furnishing of the boat, even if there was, in fact, such delay. No delay is, in fact, shown to have occurred by the record; but if there had been such delay how can that sustain the proposition of plaintiffs in error that the defendants in error were not entitled to recover for the breach of the contract in failing to furnish adequate machinery within the time contemplated by the contract after the boat had been furnished.

The case at bar is not a case in which nothing was done under the contract by defendants in error, and for the refusal to perform which plaintiffs in error were sued, in which case tender of performance would have been necessary on the part of defendants in error to have recovered from plaintiffs in error; neither is it a case where the plaintiffs in error refused to perform the contract by reason of said alleged delay; but it is exactly the case covered by the rule of law as laid down in the case in 75 Ill., and as was clearly stated by this court in *Phillips & C. C. Co.* v. *Seymour*, *supra*.

III.

The third class of errors complained of consist in the construction which the court below gave to the contract of March 30, 1882, set up in the amendment to the answer of the defendant.

The counsel of the plaintiffs in error apparently got into confusion about this contract of March 30th at the trial of the case, and in asking for instructions in relation to it, which can only account, in our minds at least, for a series of charges that were asked and refused by the court below. Thus the 28th charge quoted upon pages 28 and 36 of the plaintiff's brief and appearing in the record (p. 46) as follows:

"28. If it appear in this case that the machinery contracted for in the contract of March 30, 1882, was not possible to be made as working machinery because the material of which it was to be made was not capable of sustaining any such working pressure, yet that the material used by the defendants was of the strength of 1,500 tons, then the contract of the 30th March, 1882, must be construed as relating to the strength of the material and not to the working capacity of the machinery."

Now a reading of the contract of March 30th, (Exhibit "H," Rec. 36,) at once discloses that there was no machinery contracted for in it. On the contrary, on March 30th, all the machinery in question in this case had been constructed and was on board the boat. The contract of March 30th simply provided for the transfer of the title to this machinery, with certain extras that had been provided for, adjusting the amount due under the original contract, and including the extras and receipting for the payment of the sum named. It contained a modification of the original contract in respect to the time required to press bark into bales

and remove it from the cylinders, but in other respects expressly provided that the original agreement with its guaranties remain unaltered. We reproduce this contract entire. It is as follows:

"CINCINNATI, O., *March* 30, 1882.

In consideration of $11,200.00, to be paid, we hereby transfer to the American Pressed Tan Bark Company of New York, all the machinery embodied in our contract, and extras, with receipt in full for all material and machinery furnished T. J. McGowan & Bliss by the parties for steamer 'Tan Bark.' The terms of this sale are as follows: To continue all former agreements and guarantees except time required to press bark into bales and removal from cylinders. We further agree to transfer to said company all special patterns made for our hydraulic machinery, and also agree to transfer to the said company our exclusive interest in the accumulator and double end arrangement on hydraulic press for bark purposes only.

It is hereby agreed that the above guarantee covering hydraulic machinery extends only to the strength of material only up to the 1,500 tons pressure. We hereby acknowledge receipt of four thousand ($4,000) dollars, balance to be paid on presentation of receipts as above.

THE MCGOWAN PUMP COMPANY.
AM'N. PRESSED TAN BARK CO.,
By S. H. BEACH, *Attorney*."

The counsel for plaintiffs in error having thus assumed that it was this contract of March 30th, in which the machinery, the subject of the action, was contracted for, ask a series of charges repeating over and over again that a breach of the contract of March 30th would not entitle the plaintiff in this case to recover. Now the court in place of all these special charges, did distinctly charge the jury (Rec. 60).

"But it is insisted this contract of March 30th is not binding, and can have no effect in this suit, because defendants have not performed their part of the consideration, namely, the delivery of the vouchers or receipts mentioned, the transfer of the patterns, the interest in the patent for the accumulator, and the double end, that as to the latter

there is no patent and can be no performance. The dedendants insist, on the other hand, that the balance of the money has not been paid by plaintiff, and it can not complain of non-performance, and there is proof tending to show defendants have still pending an application for this patent.

"The court regards all this subject as immaterial to this controversy, and charges you that the obligation to perform these things by the defendants does not arise until the money is tendered or paid, and no breach could be averred until that has been done.

"But the plaintiff has not sued on that contract nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine, and nothing else. This contract is pleaded by defendants as a defense to a claim of breach, and so setting it up the only question is whether it constitutes a defense."

And again, on the same page:

"The court, therefore, charges you that its only effect is to reduce the original guaranty for the capacity of the machine in respect to the time for pressing the bale, if you find there was no fraud in procuring it; if there was such fraud it leaves that guaranty still in force. But you must understand that the failure, if any, of the defendants to deliver the vouchers, patterns, etc., does not at all contribute to any alleged breach of the guaranty for the capacity and quality of the machine, and such failure does not entitle plaintiff to recover for any thing sued for in this suit."

It thus appears that every thing contended for by the plaintiffs in error upon this contract was properly given in charge by the court to the jury, except their proposition embodied in their fifth charge, (Rec. 43,) and their 14th charge, (Rec. 44,) which were to the effect that if the contract of March 30, 1882, was in good faith entered into by the parties, it forms a complete defense to the plaintiff's cause of action; the theory being that which is presented to this court in the plaintiff's brief, to wit, that the language of the last clause of this contract is utterly incon-

sistent with the language of the first clause, and that the rule of law applicable to the construction of a will where an inconsistency is found in its provisions, to wit, that the latter clause, in case of such inconsistency, shall govern, must be applied to this contract, and the earlier clause stricken out of it. By so construing the contract our opponents affirm

"that, (Rec. 34,) this sentence was added by the parties as the last expression of their purposes and designs. The words are ill used; but carefully adapted to a plain end."

And this plain end is claimed to be the withdrawal of all the guaranties relative to the hydraulic machinery contained in the original contract of June 23d, except that the strength of the material should be such as to bear fifteen hundred tons pressure. And this, it is contended, is not a continuance of the guaranty upon this subject provided in the original agreement, but is a sort of novation of the guaranty of the hydraulic machinery contained in the original agreement, whereby the original agreement could no longer be made a basis of an action, but the suit to be maintained at all must be based upon the contract of March 30, 1882. Even then, the agreement as to the steam machinery, as contained in the original contract, would remain unaffected, as admitted by counsel, (Brief, 35,) and a general charge such as the fifth, that if the jury believes this contract of March 30th was executed in good faith, it constituted a complete defense to the plaintiff's cause of action would be erroneous. But we conceive that the rule of construction to be applied, and the proper construction of this contract under the rule is not as the plaintiffs claim. On the contrary, the contract must be construed as a whole.

It is susceptible of such construction and the express provision contained in it, continuing

"*all former agreements and guarantees, except time required to press bark into bales and removal from cylinders,*"

can not be rejected from this contract by the fact that the parties used the word "only" twice in the last paragraph of the contract. If the first of these "onlys" is read "as" it will seem to us to get rid of any awkwardness in the expression and to bring out distinctly the true meaning of the parties in the entire contract. The sentence would then read:

"It is hereby agreed that the above guarantee covering hydraulic machinery extends *as* to the strength of material only up to 1,500 tons pressure,"

excluding the claim that might have been based upon the letters of June 30th and July 5th, in connection with that of April 23d, (Rec. 32, 33,) that the guaranty of the hydraulic machinery included any warranty as to the capacity of the presses to be worked under this pressure at a speed which should turn out a bale of bark in every two and a half minutes. Look at the contract. What other guaranty in reference to the hydraulic machinery than that it should sustain this pressure; that it should be capable of being "used up to fifteen hundred tons pressure;" that it should "have sufficient capacity to do the required work," and that the time required for each pressing and delivery of a bale should be two and a half minutes, does the contract of April 23d contain? The contract of March 30th continues, by express provision, all the guarantees "except the time required to press bark into bales and removal from cylinders," that was a guaranty in respect to the hydraulic

machinery and shows conclusively that this part of the contract related to the hydraulic machinery and to the guaranties provided for it. The last clause also concedes that the guaranty in the first clause of the agreement was a guaranty in respect to the hydraulic machinery. The restriction provided for by the last clause restricts the guaranty of the hydraulic machinery as to the strength of the material to its being sufficient to be used up to the fifteen hundred tons pressure, as provided in the original contract, but excludes any implication that it should also have sufficient strength beyond that to do the required work, to wit, to press and deliver a bale of bark every two minutes and a half, if a greater strength than to work up to fifteen hundred tons pressure might be requisite to do that. This court, in the case of *M. & M. R. Co.* v. *Jurey*, 111 U. S. 592, says:

"The court was called upon to construe a paper writing. It must be conceded that the writing was open to construction. It was the right and duty of the court, in order to decide upon its meaning, to look not only to the language employed, but to the subject-matter and surrounding circumstances. *Barreda* v. *Silsbee*, 21 How. 146, 161; *Nash* v. *Towne*, 5 Wall. 689; *Canal Company* v. *Hill*, 15 Wall. 94. When, therefore, the court was required to state authoritatively to the jury the meaning of the bill of lading, it can not be presumed that it shut its eyes to the strong light thrown on it by facts attending its execution, or that its instruction is to be interpreted as applying only to the words of the contract. It must be presumed that the court used all proper means to ascertain the true meaning of the bill of lading, and we think its interpretation, in view of all the circumstances of the case, was the right one."

The record in this case does not profess to set out all the facts attending the execution of this contract which might throw a strong light upon its meaning, and that

were before the court below at the trial of the case. This court will presume that it used all proper means to ascertain the true meaning of the contract of June 23, 1881, and we think there is no doubt that its interpretation, in view of all the circumstances of the case, was the right one.

IV.

As to the errors of the court in not permitting a recoupment of the sum of seventy-two hundred dollars, the sum remaining due under the contract of June 23, 1881, or the contract of March 30, 1882, if it remained in force, or the further sum of $1,531.46 for extra work alleged to have been performed by the defendants below, it appeared not only that the defendants below filed no pleading setting up a counterclaim, or in which they sought in any wise a reduction of the damages claimed by recoupment, but it appeared affirmatively by the allegations of the amended answer, (Rec. 11,) that The McGowan Pump Company had brought, as it had a right to do, a separate suit for the recovery of $1,531.46, which was still pending at the time of the trial of this cause; and it appears inferentially from the charge, (Rec. 58,) as is admitted upon page 12 of our adversary's brief, that it had brought a separate suit for the amount remaining due as a balance under the original contract, which suit was removed into the Circuit Court and is there still pending. It is proper that we should state that this plaintiff was quite willing in the court below that the amounts claimed in these two suits should be deducted from the amount of its recovery in this case, and it is quite willing, we may add, that that should be done under the order of this court, provided that The McGowan

Pump Company, the corporation in whose name the suits are brought and prosecuted for these amounts, would file a release of all claim thereto in this cause. They refused to do this in the court below. We presume they will refuse to do it in this court, and the record of this cause presents no bar to the prosecution of these claims, either by the defendants or by the alleged corporation, The McGowan Pump Company, whichever it may be that has title to maintain such an action.

V.

The fifth error alleged, (Brief, 42,) is that the court did not instruct the jury that although the machinery should be found in fact to be incapable of working up to the pressure of fifteen hundred tons, as required by the contracts between the parties, and although there was no testimony to show that without that capacity it was of any value whatever beyond its value as scrap iron, and although the only testimony upon that subject which the record shows was offered, was that offered by the plaintiff below, (Rec. 28,) "tending to show that the machinery was only of the value of scrap," nevertheless the court ought to have instructed the jury that the plaintiff ought not to recover any damages based upon such incapacity of the machinery to work as the contract required, and as the defendants below guaranteed that it would have. Our learned adversaries say in argument that the damages to which the plaintiff below would be entitled, if any, for the non-performance of an impossible contract, is the loss of actual value. Was there any testimony in this case preserved in this record, tending to show that the loss of actual value upon this machinery, upon its failure to work as the contract provided, was less

than the amount which the jury assessed in their verdict? Or was there any testimony that the value of the machinery if it would only work with a pressure that had no effect upon tan-bark for the purpose of pressing it into bales, was of any value except as old iron? The charge which the court actually gave upon the subject of damages for the breach of the contract to make the machinery as required by the contract may be found condensed in a single extract (Rec. 65):

"The rule for measuring the plaintiff's damages is to find the difference between the money value of the machinery contracted for, if it had been constructed in all respects according to the contract as it has been construed by the court, and the money value of the machinery as it was actually constructed and delivered to the plaintiff."

That this was not the correct rule of damages, our learned adversaries will hardly venture to contend.

VI.

As to the alleged error complained of in refusing charge No. 24, (Brief, 44,) which is a charge which sought to make the ignorance of the defendants below of the necessities of the contract entered into an excuse for the nonperformance of it. The court distinctly charged the jury as follows (Rec. 62):

"It is an indisputable fact that before they made their contract they knew of the design for the boat and fully of all its plans and specifications, as shown in the Mack contract, and, if the plaintiff's proof is believed by you, they were instrumental in determining upon the plans and specifications of the boat. But whether this is so or not, they certainly knew fully all about the Mack contract and what it required, and planned their machine in full knowledge of

what that boat would be if Mack complied with the contract. Therefore they can not complain of any mere defect in design of the boat of a restriction in their freedom of selection of plans for the machine they were to furnish. But this knowledge, nor any part they took in advising about the boat nor the supervision of its construction, if you find they agreed to any supervision, could not and did not bind them to any guaranty that the boat should be constructed in accordance with and up to the requirements of the contract with Mack. They were not guarantors of Mack's work, and Mack was the plaintiff's agent, not theirs. The plaintiff was bound to furnish a boat fully up to the Mack contract in its specifications so far as the boat was needed as a mechanical foundation for the proper working of the machine. It is for you to determine this on the proof. If the boat bore no more relation to the machine than that of carrier, and was not essential to it further than to bear it up—no more intimate mechanical relation than the case of a watch bears to its machinery, to use an illustration from the proof—the defendants would not be excused for any defects in the boat which did not contribute to defective working of the machine. So far as the machine failed on that account the defendants would not be liable, but would be liable for any other defects in the machine. If, however, on the proof you find that the boat had a more intimate relation than a mere bearing foundation, and was so indentified with the machine as to be an essential part of its mechanical foundation, I charge you that the defendants would be excused from any defects dependent on the insufficiency of that particular part of the mechanical foundation until the plaintiffs had made it good, after which the machine should work properly and the defendants would be liable for any further failure in the mechanism."

Surely this was what the charge No. 24, requested by the plaintiff in error, was not, a proper discharge by the court below of its duty "carefully to distinguish the effect of a floating foundation, such as this boat was, upon the result of the working of the machinery from defects in the machinery itself," and therefore in compliance with the obligation which our adversaries say rested with the court.